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No. 55.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Appellant,
vs.
HAROLD E. WEST, Chairman, and J. FRANK HARPER and STEUART PURCELL, Members, Constituting the Public Service Commission of Maryland,
Appellees.

No. 64.

HAROLD E. WEST, Chairman, and J. FRANK HARPER and STEUART PURCELL, Members, Constituting the Public Service Commission of Maryland,
Appellants,
vs.
THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Appellee.

APPEAL FROM, AND CROSS-APPEAL FROM AND PETITION FOR CERTIORARI TO, THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, APPELLANT IN No. 55 AND CROSS-APPELLEE AND RESPONDENT IN No. 64.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 55.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Appellant,

vs.

HAROLD E. WEST, Chairman, and J. FRANK HARPER and STEUART PURCELL, Members, Constituting the Public Service Commission of Maryland,
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Appeal From, and Cross-Appeal From and Petition for Certiorari to, the Court of Appeals of the State of Maryland.

BRIEF FOR THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, APPELLANT IN No. 55 AND CROSS-APPELLEE AND RESPONDENT IN No. 64.

The opinion of the Court of Appeals of Maryland (on a second appeal) is reported in 145 Atl. 340. This opinion follows and reaffirms the majority opinion on a former appeal, reported in 155 Md. 572, with a concurring opinion by JUDGE ADKINS and dissenting opinions by JUDGE PARKE and CHIEF JUDGE BOND.

The appellant, (cross-appellee and respondent), The United Railways and Electric Company of Baltimore, will be called the Company; the appellees, (cross-appellants and petitioners), The Public Service Commission of Maryland, will be called the Commission.

THE QUESTION.

This case presents no conflict of evidence as to any fact now material.

The principal question presented is, **Whether or not limitation by the Commission of the Company's rates to a return of not more than 6.26 per cent. on the undisputed value of its property is confiscatory**—the uncontradicted evidence showing that since July 1, 1920, the average cost to the Company of *borrowed* money (other than current bank loans) was 7.23 per cent., the lowest 6.6 per cent., the last 7.32 per cent. [R. 1638, 1658; 155 Md. 591, 611; *infra*, 135, 159], and that this experience is quite in line with the general situation of street railways, though not of other business generally. [R. 1145, 1146.] The lower state court (JUDGE ULMAN) and the dissenting judges of the Court of Appeals (JUDGE PARKE and CHIEF JUDGE BOND) answer this question in the affirmative; the majority of the Court of Appeals answer in the negative. From the answer of the majority the Company appeals.

The opposing answers to this question, by the Commission and the majority of the Court of Appeals on the one hand and the lower state court and the dissenting judges on

the other, turn on broader, more far reaching questions, *e. g.*, (1) whether or not the Company has a constitutional right to be permitted to earn any fair return at all except what the Commission sees fit to permit or (2) whether the determination of what return is confiscatory or non-confiscatory is controlled by the repeated decisions of this Court or "can only rest in the judgment of the Commission." These broad issues are drawn in the opposing opinions and conclusions on the same undisputed facts. The Commission professes to consider the opinions of this Court on the question what is a constitutional fair return, but turns this Court's reasoning upside down and reaches what JUDGE ULMAN aptly terms "an inverted conclusion" [R. 75], viz., that the *greater* the risk, *i. e.*, the *greater* the return necessary to attract capital, the *less* the rate of return to which a utility is constitutionally entitled. JUDGE ULMAN, following the opinions of this Court, held the Commission's rates confiscatory and enjoined them. The dissenting judges of the Court of Appeals, likewise following the opinions of this court, are of like opinion.

The majority of the Court of Appeals (otherwise largely following the Commission) does not profess to follow the opinions of this Court on the question of rate of return. The opinion declares, in a spirit of judicial agnosticism, that "while there are cases which hold that such utilities are entitled to a return of six or seven or eight per cent. on the value of their properties, they have no controlling weight, because the decisions are uniformly found to be based upon facts peculiar to the several cases. So in this particular case, in deciding whether the schedule of rates prescribed by the Commission is confiscatory, we must be guided by the facts of this case, and are little aided by what this court or some other court may upon different facts have found to be lawful or confiscatory, fair or unreasonable rates." [R. 1631; 155 Md. 584; *infra*, 127.] Not only is the opposite attitude of this Court in *McCardle vs. Indianapolis Co.*, 272

U. S. 400, 419-420, toward previous cases on rate of return ignored; the Court of Appeals also ignores the explicit statement that in that case "a reasonable rate of return is not less than seven per cent." [272 U. S. 420], actually confuses the opinion of this Court with the dissenting opinion and calls the *negation* of this statement in the dissenting opinion an "interpretation" of this Court's opinion. [R. 1646; 155 Md. 599; *infra,* 144.] The statement in *Dayton-Goose Creek R. Co. vs. United States,* 263 U. S. 456, 486, that "the question of the minimum of a fair percentage on value is shown to vary with the circumstances" [R. 1647; 155 Md. 600; *infra,* 145] is treated as if it overruled everything else said by this Court, before or since, concerning rate of return and as if it justified acceptance of *any* circumstances, however irrelevant, that a Commission chooses to accept in justification of any rate of return it sees fit to allow.

JURISDICTION.

The Company, pursuant to rule 12, paragraph 1, of this Court, has filed its statement as to jurisdiction in No. 55, and this Court has found that probable jurisdiction has been shown [49 S. Ct. 418]. In No. 64 the Commission has filed its statement as to jurisdiction and also its petition for certiorari, the Company has filed an opposing statement as to jurisdiction on cross-appeal or certiorari, and this Court has postponed to the hearing further consideration of the question of jurisdiction and the petition for certiorari. On the questions thus reserved as to jurisdiction in No. 64, the Company refers to its statement already on file herein.

STATEMENT OF THE CASE.

No. 55 is an appeal by the Company from a final decree passed March 20, 1929, affirming dismissal of a supplemental bill to enjoin enforcement of certain orders of the Com-

mission limiting the Company's carfares and claimed by the Company to be confiscatory. The supplemental bill [R. 1681-1689], filed December 12, 1928, in the Circuit Court No. 2 of Baltimore City, an equity court of general jurisdiction, is a bill (*a*) to vacate and set aside, and (*b*) to enjoin enforcement of, an order of the Commission passed February 10, 1928, (as amended by an order passed November 28, 1928) and any prior orders in so far as they limit the Company's rates. The original bill [R. 5], filed March 13, 1928, was a similar bill to vacate and set aside, and enjoin enforcement of, the order of February 10, 1928, and prior rate orders. If (1) a bill invoking the inherent equity jurisdiction to protect property rights by injunction against unauthorized acts of administrative bodies or officers under color of office and (2) a statutory "action" to vacate and set aside Commission orders under section 43 of the Public Service Commission Law [Annotated Code of Maryland, Edition of 1924, Article 23, section 404; *infra*, 109, Appendix A, Maryland statutes] are different remedies, then this supplemental bill (like the original bill) is *both*. If (as the Court of Appeals apparently means to imply) Maryland statutory provisions for review of Commission orders do not constitute a new statutory system of review distinct from the inherent equity jurisdiction, but are merely declaratory and amendatory of the inherent equity jurisdiction and procedure, then this supplemental bill (like the original bill) is a bill invoking the inherent equity jurisdiction as modified by statute (so far as such modifications are constitutionally valid).

On August 1, 1927, the Company applied to the Commission for an increase in fares (then limited by Commission order to 7½ cents token fare or 8 cents cash) to 10 cents flat (except half-fares, school fares and commutation fares). [R. 89.] On September 20, 1927, after hearings, the Commission passed an order denying any "emergency" relief through temporary increased fares, although the uncontra-

dicted evidence demonstrated that then existing fares were confiscatory. [R. 112.] On February 10, 1928, after further hearings but on substantially the same facts, the Commission passed an order denying the Company's application for a flat 10 cent fare and limiting fares to 8⅓ cents (or 9 cents cash), which the Commission estimated would yield the Company a return of not more than 6.26 per cent. on the undisputed value of its property. [R. 57-59.] In its opinion [R. 14] the Commission found (1) that the present fair value of the Company's property is $75,000,000 and (2) that the annual return that can reasonably be expected from the rates so fixed is $4,691,606 and amounts to a return of 6.26 per cent. on the fair value of the property.

In the original bill the Company maintained, *inter alia*, that the Commission's order, and its prior orders, were confiscatory because (1) limitation of the Company's rates to yield not more than 6.26 per cent. is confiscatory and (2) the Commission's annual depreciation allowance was fixed on a wrong basis, cost instead of present value of depreciable property, and was grossly inadequate, and the Commission rates therefore would actually yield less than 6.26 per cent. [R. 5-12]. The Circuit Court (JUDGE ULMAN) held the Commission's orders and rates confiscatory on both of these grounds and on May 11, 1928, passed a final decree so adjudging and enjoining enforcement. [R. 85-86.] On July 16, 1928, the Court of Appeals (*a*) reversed in part the decree of the Circuit Court and held (JUDGE PARKE and CHIEF JUDGE BOND dissenting) a return of 6.26 per cent. not confiscatory and (*b*) remanded the case to the Commission for further proceedings to determine a proper depreciation allowance, based not on cost but on present value, and make any rate changes necessary to yield the same estimated return, *i. e.*, not more than 6.26 per cent. [*Public Service Commission vs. United Railways Company*, 155 Md. 572; R. 1622-1659; *infra*, 117-160]. On November 19, 1928, the Company's appeal (and also the Commission's) from that

decree of the Court of Appeals was dismissed for lack of jurisdiction on the ground that the decree of the Court of Appeals was not a final decree. [*United Railways and Electric Company of Baltimore vs. West,* 278 U. S. 567; *West vs. United Railways and Electric Company of Baltimore,* 278 U. S. 567, 648.]

Pursuant to the opinion of the Court of Appeals the Commission on November 28, 1928, determined the proper annual depreciation allowance to be $755,116 more than its previous allowance and accordingly amended its order of February 10, 1928, by limiting fares to 8¾ cents (or 10 cents cash) instead of 8⅓ cents (or 9 cents cash). [R. 1695-1697.] This increase in fare was allowed to furnish *only* increased revenues equal to the increase in depreciation allowance, *i. e.,* to yield not more than 6.26 per cent. [R. 1695, 1699]. The Company filed its supplemental bill in the Circuit Court to enjoin enforcement of the Commission's order of February 10, 1928, as amended by the order of November 28, 1928, as confiscatory. [R. 1681-1689.] The Circuit Court, in accordance with the opinion of the Court of Appeals, dismissed the supplemental bill; the Court of Appeals, for the reasons given in its opinion on the first appeal, affirmed the decree of January 10, 1929, dismissing the Company's supplemental bill. [*United Railways and Electric Company vs. West,* 145 Atl. 340; R. 1712-1716.]

Value of Property.

No question is presented as to the value of the Company's property. In the lower state court the Company first complained of failure of the Commission to make allowance for additions since January 1, 1924. It developed, however, that the only dispute on this score was principally a matter of dates and that the Commission's counsel construed the Commission's opinion as bringing the valuation down to a date which left little present difference in dollars and cents between the parties and thus made the question

presently unimportant. For all the purposes of this case therefore the undisputed value of the Company's property is $75,000,000. The Court of Appeals says: "The total value of the Company's property, including easements, may be placed at $75,000,000. That was the valuation placed upon it by the Commission in 1924 [*i. e., as of* December 31, 1923], and while there was some dispute as to whether that figure should not be increased to include additions since the valuation, that contention was not stressed in this court, but was treated as a matter of detail which could be adjusted to fit the facts at some future time, so that the figure of $75,000,000 may be treated as the true value of the Company's property for all the purposes of this case." [R. 1631, 155 Md. 584-585, *infra*, 127.]

In the instant case, not only in the Court of Appeals and in the Circuit Court but also before the Commission itself, the Company and the Commission accepted without dispute the valuation (by statute made *prima facie* evidence of value) of the Company's property for rate making purposes by the Commission, after exhaustive investigation, in a valuation case under section 30 of the Public Service Commission Law [Code of 1924, Art. 23, sec. 385, *infra*, 107]. On March 9, 1926, the Commission had ascertained the fair value for rate making purposes of the Company's property on December 31, 1923, to be $77,000,000, including $7,000,000 for easements. [R. 335-337.] The Commission's order making this valuation was confirmed by the Circuit Court of Baltimore City. On appeal to the Court of Appeals the case was remanded for further proceedings on the sole question of the *amount* of the value of easements. [*Miles vs. Public Service Commission*, 151 Md. 337.] The Court of Appeals held that the Company's easements in public streets, as well as in private property, "are an interest in real estate, and whatever value they have as an interest in real estate the company is entitled to have included by the Commission in making up the rate base" [151 Md. 347], but

that the value of such easements for rate making purposes must be determined "on a strictly land value basis" [151 Md. 343], so as not to include "any value attributable to these easements which is dependent upon the earnings of the company." [151 Md. 347.] The Court of Appeals thus flatly rejected the contention that in Maryland easements in public streets (resulting from the exercise of franchises) should not be included as property, in ascertaining the value of property for rate making purposes, because the value of such easements is dependent upon earnings. [151 Md. 339-340. *Cf. Georgia Ry. vs. R. R. Commission,* 262 U. S. 625, 632.] In rejecting the contention the Court ruled (1) that the case of *Consolidated Gas Co. vs. Baltimore City,* 101 Md. 541, definitely settles that such an easement is property, viz., an interest or estate in land, but (2) that the value of such an easement for rate making purposes must be ascertained "on a strictly land value basis" and not on a basis dependent upon earnings. That in Maryland easements in public streets are property interests or estates in land had been definitely settled in tax cases [*Consolidated Gas Company vs. Baltimore City,* 101 Md. 541; *Appeal Tax Court vs. Union R. Co.,* 50 Md. 274] arising *not* under special statutes taxing easements or franchises *eo nomine* [*Metropolitan Ry. Co. vs. New York,* 199 U. S. 1] (which might throw little or no light on *property* questions as such) but under *general* laws taxing *real property.* Such easements in Maryland, like any other property rights recognized by local law, *e. g.,* water rights [*McCardle vs. Indianapolis Co.,* 272 U. S. 400, 413; *San Joaquin Co. vs. Stanislaus Co.,* 233 U. S. 454, 459; *Denver vs. Denver Union Water Co.,* 246 U. S. 178, 192-193] or under special circumstances franchises [*Willcox vs. Consolidated Gas Co.,* 212 U. S. 19, 42-48], are thus part of the property on the value of which a utility is entitled to earn a return. After remand by the Court of Appeals and further proceedings and hearings before the Commission, the

Commission valued the Company's easements "on a strictly land value basis" at $5,000,000 and thus ascertained the fair value for rate making purposes of the Company's property on December 31, 1923, to be $75,000,000. [R. 356-357.] The hearings in the valuation case had been concluded before the Company's application of August 1, 1927, for increased rates, but the Commission's opinion and order in the valuation case were not filed until February 1, 1928.

Revenue from Rates.

Nor is any question presented as to the amount of the annual return to be expected from the rates fixed by the Commission. The Company's position is that *if* these rates yield the return estimated by the Commission, viz., 6.26 per cent., they are confiscatory. If they yield *less* than the Commission estimated, then they are still more confiscatory. In fixing these rates the Commission estimated a smaller continued decrease in passengers (due to continued increase in use of automobiles) than the Company did [R. 30-31, 55], and consequently a larger return from rates. It is not contended that these rates have actually yielded more than the Commission estimated. Indeed the Commission's answer to the supplemental bill contains averments to the contrary [R. 1700-1701]—averments wholly unsupported by findings of the Commission or evidence before the Commission, and therefore properly unnoticed by either the Circuit Court or the Court of Appeals. In respect of these unsupported averments it may be admitted that decline in number of passengers has continued and rates have yielded less than the Commission estimated, (though substantially more than prior lower rates), *i. e.*, less than 6.26 per cent., but the Company would emphatically deny that the principal cause of this continued decline in passengers is increased rates or is other than continued increase in the use of automobiles.

Much cumulative or argumentative testimony about undisputed facts as to revenue and number of passengers may be summed up (so far as material) in a very few controlling facts noted in practically all the opinions, including the Commission's. For several years the total number of passengers has decreased. Nevertheless the peak load—the most expensive service—continues to increase. [R. 712, 1244. Opinion of the Commission, R. 22. Opinion of JUDGE ULMAN, R. 74. Opinion of JUDGE PARKE, R. 1657; 155 Md. 610, *infra*, 157.] This decrease in total number of passengers—with accompanying increase in peak load—is due principally to increased use of automobiles. As JUDGE ULMAN observes, the use of automobiles has *modified* the need for the Company's service in Baltimore but has shown no tendency to supplant it; this modification makes the service *more costly*, but *no less necessary* than ever. [R. 74-75]. As the Court of Appeals says, "while the total number of revenue passengers is decreasing, the peak load of passengers, that is, the greatest number of passengers carried during the 'rush hours' each day has increased, and to accommodate that increasing demand, it has become necessary for the Company to maintain an increased equipment which is to some degree idle during a part of the day." [R. 1638; 155 Md. 590; *infra*, 135.]

Annual Depreciation Allowance.

The Commission seeks review, on cross-appeal and/or certiorari, of certain action on one question, viz., whether on an issue of confiscation *vel non* the Company's annual depreciation allowance should be based on present value or on cost of depreciable property. The same question will doubtless be raised by the Commission as part of the question of confiscation on the Company's appeal.

In this Court this question involves no question of fact. In the original bill the Company maintained that *(a)* value, not cost, is the proper basis for annual depreciation allow-

ance and (b) $2,200,000 would be a proper allowance, and that the Commission's original allowance of $883,544 was (*a*) fixed on a wrong basis, cost instead of value, and (*b*) grossly inadequate in any event. Both the Circuit Court and the Court of Appeals held that the Commission's allowance was fixed on a wrong basis, cost instead of value; this made it unnecessary to decide whether the *amount* of the Commission's allowance was otherwise inadequate. In the supplemental bill, after new evidence before the Commission on this question, the Company raised no question as to the *amount* of the Commission's allowance ($1,638,660, instead of $2,200,000 claimed by the Company) and therefore can not now raise any such question. [R. 1708.]

The only question as to depreciation now presented therefore is the question of law, whether annual depreciation allowance should be based on present value or on cost.

Halethorpe.

In addition to the principal question presented in the instant case the Company's appeal also presents a separate question as to the constitutionality of a provision, in the Commission's order of February 10, 1928, abolishing the second fare to Halethorpe, a community in Baltimore County. The Company maintains that this provision in the Commission's order is unconstitutional and confiscatory. The state courts sustained the provision. The facts (which are not disputed) will be stated in connection with the argument on this point [*infra*, 97-100].

The Record.

The Record in this Court comprises the printed record in the Court of Appeals. [28 USCA, §866.] The record in the Court of Appeals comprised the record in the Circuit Court No. 2 of Baltimore City, except so much of the evi-

dence as was omitted by stipulation. [R. 1615-1619, 1707-1708.] In the Circuit Court No. 2 of Baltimore City the case was heard on the pleadings and the transcript (filed by the Commission pursuant to section 44½ of the Public Service Commission Law [406; *infra,* 111]) of papers and proceedings, including evidence, in the case before the Commission. [R. 85, 1705.] No new evidence was offered. The statement, in the opinion of the Court of Appeals, that "evidence [was] offered by the Commission, the Company and intervening persons interested in the matter" [R. 1624; 155 Md. 577; *infra,* 120] is applicable only to the evidence contained in the transcript of proceedings before the Commission. The evidence in this transcript is evidence in court. [*Public Service Commission vs. N. C. Ry. Co.,* 122 Md. 355, 387-388.]

Section 44½ of the Public Service Commission Law [406; *infra,* 111] provides that before the trial a certified transcript of all the papers and proceedings, including evidence, in the case before the Commission, except such as are omitted by stipulation, shall be filed by the Commission and shall be evidence in like manner as the originals. In the instant case much irrelevant matter was omitted by stipulation. Before the Commission the records in the Company's valuation case and four previous rate cases were offered in evidence [R. 361]. In the transcript these records, except the opinions and orders [R. 115-357] and certain specified parts of the evidence [R. 1306-1347, 1349-1379], were omitted by stipulation.

The records in the Company's valuation case and its four previous rate cases comprise practically its entire rate history and general corporate history from, and even before, the formation of the present corporation by consolidation in 1899. Before the passage of the Public Service Commission Law in 1910 the Company's fares were limited to five cents by a statute [Acts of 1900, Chapter 313, amending Public Local Laws, Art. 4, sec. 796; *infra,* 112], which was

repealed by section 31½ of the Public Service Commission Law [387; *infra,* 109], which in turn left it to the Commission only to fix the time when the repeal should become operative. [*Chenoweth vs. Public Service Commission,* 143 Md. 622, 628-629; *Gregg vs. Public Service Commission,* 121 Md. 1, 30-31.] On October 1, 1918, the Company's fare was increased from five to six cents by a schedule filed with the Commission; this fare was approved by the Commission by an order passed January 7, 1919. [R. 149; 10 P. S. C. Maryland, 39, 65.] By orders passed September 30, 1919, [R. 216; 10 P. S. C. Maryland, 253, 300, 335], December 31, 1919, [R. 244; 10 P. S. C. Maryland, 359, 364-B] and May 26, 1924, [R. 274; 15 P. S. C. Maryland, 102, 120], respectively, the fare was successively changed to six and one-half, seven and seven and one-half cents. The change to seven and one-half cents was accompanied by zone extensions, decreased school fares and other pecuniary burdens, *which almost entirely absorbed the increase.* [Opinion of Commission, February 10, 1928, R. 21.]

The issues now presented seem to require of this Court but little examination of the Record beyond the opinions, of the Commission and in the state courts, in the instant case. Some of the Company's history, from the records in this and previous cases before the Commission, is recited in the opinion of the Court of Appeals. Little of this history seems now material. If however this Court should desire to locate the sources of statements of fact in the opinion of the Court of Appeals, this can be done from a copy of that opinion appended hereto as Appendix B [*infra,* 117-160], in which have been inserted Record references for statements of fact.

ASSIGNMENT OF ERRORS.

The Court of Appeals of Maryland erred:

1. * * * in not reversing the decree of the Circuit Court No. 2 of Baltimore City dismissing the plaintiff's supple-

mental bill of complaint and in not adjudging and decreeing that the rates fixed by Order No. 12639 of the Public Service Commission of Maryland, passed on February 10, 1928, as amended by Order No. 13420 passed on November 28, 1928, and said orders and prior orders limiting rates charged by the plaintiff are unconstitutional and fail to allow to the plaintiff a fair return on the fair value of its property, (*i. e.*, that they deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States), and in not vacating and setting aside Order No. 12639, as amended by Order No. 13420, in so far as the same purports to limit the rates of the plaintiff and in not enjoining the defendants (appellees in the Court of Appeals of Maryland, defendants in the Circuit Court No. 2 of Baltimore City and herein called "defendants") against enforcing against the plaintiff the provisions of said Order No. 12639, as amended by Order No. 13420, or any prior orders, in so far as the same limit or purport to limit the rates of fare to be charged by the plaintiff.

2. • • • in not holding that a schedule of fares which permits the plaintiff to earn a return of not more than 6.26 per cent. on the fair value of its property is confiscatory and deprives the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and in holding that Order No. 12639 of the Public Service Commission of Maryland, as amended by Order No. 13420, and the schedule of rates fixed thereby, are not confiscatory and do not deprive the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

3. • • • in holding that the question whether fares which permit a return of only 6.26 per cent. are confiscatory "must be approached • • • from the standpoint of the State" and in such approach "factors • • • such as the nature and

necessity of the service, the effect of its continuance or withdrawal, both upon the security holders of the corporation, and upon property values, and the welfare of the people in the territory served by it, the extent to which the State itself is a partner in the enterprise, and the circumstances and conditions under which the [plaintiff] acquired and exercises its franchises and privileges may become of paramount and controlling importance"; thus holding that, under the guise of "approaching" the question what is a fair return and giving weight to various "factors" in the question, the question may actually be ignored and evaded and supplanted by various so-called "factors" which do not properly control or affect the question at all.

4. * * * in holding that the plaintiff's constitutional right to a fair return on the fair value of its property affords no excuse for "increasing [its rates] to a point which will not only be burdensome to the traveling public but will at the same time yield to the [plaintiff] a greater return than it has ever received, and greater than that actually received by others operating in the same field elsewhere under substantially the same conditions" [*i. e.*, under confiscatory rates], and that "whether a given rate is burdensome to the public involves an extremely difficult and troublesome question, the answer to which, except in extreme cases, can only rest in the judgment of the Commission operating upon varying factors each of which is entitled to some weight, but no one of which ordinarily is controlling," thus holding that private property embarked in a utility business does not "rest secure under the constitutional protection which extends * * * to the right to receive just compensation for the service given to the public" [*The Minnesota Rate Cases*, 230 U. S. 352, 434] but that this constitutional protection "can rest only in the judgment of the Commission" and that past confiscation of the plaintiff's property and present confiscation elsewhere legalize perpetual confiscation of the plaintiff's property.

5. * * * in holding that "in determining whether the rates fixed by the Commission are confiscatory we are finally remitted to a few simple realities, such as the past earnings of the Company, [to which the Court of Appeals gives effect precisely the opposite of that given by the Supreme Court of the United States], the returns usually received by other companies engaged in the same business under somewhat similar conditions [*i. e.*, under confiscatory rates], the rates which the [plaintiff] has voluntarily fixed for its service in the past, the decrease in the purchasing power of the dollar, and the effect which other orders of the Commission have had upon the earning power of the [plaintiff]", but that the last two of these factors (regarded by the Court of Appeals as tending to support the plaintiff's position) "were considered fully by the Commission when it fixed the base fare at 7½ cents in 1924, and in view of that finding and of the further fact that the record does not disclose any data sufficiently specific to enable us to say that it was unlawful, we are not inclined to give them any controlling weight now"; thus holding (1) that the question whether rates are confiscatory may be determined from "simple realities" which do not properly affect the question at all and (2) that on this question of confiscation a previous rate order is (unless now specifically proved to have been unlawful) *res judicata* as to facts then considered by the Commission, although (*a*) commission rate orders do not so operate and (*b*) this 1924 rate order could not so operate because the value of the plaintiff's property had not been determined at all and in that case the question of confiscation could not be and was not determined by the Commission and the Commission's own views were expressly tentative, pending determination of the value of the plaintiff's property.

6. * * * in not holding that failure of a State to "provide a fair opportunity for submitting" the question of confiscation "to a judicial tribunal for determination upon its own

independent judgment as to both law and facts" is a deprivation of liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and in holding that the Supreme Court of the United States (in so holding) did not mean what it said but meant precisely the opposite.

7. * * * in confusing the opinion of the Supreme Court in *McCardle vs. Indianapolis Water Works Co.*, 272 U. S. 419, with the dissenting opinion, treating the dissenting opinion as an "interpretation" instead of a negation of the Court's opinion, and thus acting on that case as not deciding what it very clearly did decide, viz., that on the evidence therein and the authority of recent decisions in other cases, rates yielding a return of less than 7 per cent. would be confiscatory.

8. * * * in holding that decisions of the Supreme Court of the United States that certain utilities are entitled to certain returns on the value of their properties "are uniformly found to be based upon facts peculiar to the several cases" and in the instant case the Court of Appeals "is little aided by what" the Supreme Court "may upon different facts have found to be lawful or confiscatory, fair or unreasonable rates."

9. * * * (when holding that Maryland statutes deprive all Maryland courts of the right and power to enjoin enforcement of confiscatory rate orders, thereby deprive the plaintiff of all judicial remedy against the enforcement of confiscatory rate orders, and in lieu of all judicial remedy merely remand the plaintiff for relief against confiscation to the confiscators themselves) in not holding that Maryland statutes, so construed and applied, deprive the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

10. * * * (when holding that by reason of Maryland statutes, one confiscatory rate order might be vacated by the Courts, leaving prior orders still more confiscatory in force, but all unconstitutional orders can not be vacated by the Courts, thus holding that the Courts can protect constitutional rights against one unconstitutional order but, when all orders are unconstitutional, can only remand the plaintiff to further action by the confiscators) in not holding that the Maryland statutes, so construed and applied, deprive the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

11. * * * (when holding that Maryland statutes not only empower the Public Service Commission to regulate the plaintiff's rates but also deprive the plaintiff of its constitutional right, subject to regulation, to initiate and make rates) in not holding that Maryland statutes, so construed and applied, deprive the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

12. * * * (when holding that even the fact that all Commission rates are confiscatory does not "authorize * * * the [plaintiff] to fix" its own rates [subject to the continuing power of regulation] or the Courts to set aside all unconstitutional Commission orders and "leave the question of rates * * * to the discretion of the [plaintiff]" [subject to regulation], but "under the statute the power to [fix rates] is in the Commission alone") in not holding that the Maryland statute, so construed and applied, makes the Commission "the financial manager" of the plaintiff and clothes the Commission "with the general power of management incident to ownership" [*Southwestern Tel. Co. vs. Public Service Commission*, 262 U. S. 276, 289] and thereby deprives the plaintiff of its liberty and property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

13. * * * in not reversing the decree of the Circuit Court No. 2 of Baltimore City dismissing the plaintiff's supplemental bill of complaint, and in not adjudging and decreeing that that portion of Order No. 12639 of the Public Service Commission of Maryland which extended the first fare zone on the plaintiff's Halethorpe line to the terminus of said line at Halethorpe is unconstitutional and deprives the plaintiff of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and in not vacating and setting aside said portion of said order and enjoining the defendants against enforcing the provisions of said order. [R. 1718-1723.]

ARGUMENT.

The Company's position is:

I. Limitation by the Commission of the Company's rates to a return of less than eight per cent. is confiscatory; the Commission's reasons for finding 6.26 per cent. a fair return have no true relation to the fairness of a return.

II. The Company's annual depreciation allowance is properly based on present value, not on cost, of its depreciable property.

III. The abolition of the second fare to Halethorpe is unconstitutional and confiscatory.

Before discussing the principal question and the other two questions just mentioned, two questions concerning judicial review of Commission orders (presented in assignment of errors 6, 9, 10, 11 and 12) may first be considered.

Questions concluded in the Court of Appeals on the first appeal are now reviewable here on appeal from the only decree that was "final" and therefore reviewable here. [*Louisiana Nav. Co. vs. Oyster Commission*, 226 U. S. 99, 101-102.]

Judicial Review of Commission Orders.

The only Maryland statutory provisions governing judicial review of Commission orders are sections 43-47 of the Public Service Commission Law [404-409; *infra,* 109-112]. Whether these provisions (1) constitute a new statutory system of review distinct from the inherent equity jurisdiction or (2) are merely declaratory and amendatory of the inherent equity jurisdiction and procedure, is perhaps not clear from the decisions of the Court of Appeals but is not material in the instant case. If a statutory "action" to vacate and set aside Commission orders under section 43 [404; *infra,* 109] is a different remedy from an ordinary bill for injunction, then the Company by its original bill (and again by its supplemental bill) has expressly invoked *both* remedies. If, on the other hand, the statutory "action" is a mere statutory modification of the ordinary bill for injunction, then the Company has invoked the inherent equity jurisdiction as modified by statute (so far as such modifications are constitutionally valid).

Whether these provisions create a new remedy or only modify an old one, they differ little, except as to the parties who may invoke review and the rights which may be protected thereby, from the inherent equity jurisdiction by injunction, unmodified by statute. Inherent equity jurisdiction to protect property rights by injunction necessarily depends upon the existence of some property right which is independent of and paramount to the rate statute. On the other hand the same statutory authority which confers rate-making powers may also confer the right to invoke judicial review on parties who have no such property rights as would entitle them to invoke equity jurisdiction without statutory authority. By section 43 [404; *infra,* 109] the right to invoke judicial review is conferred broadly on "any person in interest being dissatisfied with any order of the Commission." This includes not only (1) all persons whose property rights may be protected by invoking inher-

ent equity jurisdiction, *e. g.*, any utility whose rates are limited by Commission order [*Public Service Commission vs. N. C. Ry.*, 122 Md. 355; *Penn. R. R. Co. vs. Public Service Commission*, 126 Md. 59; *Havre de Grace Bridge Co. vs. Public Service Commission*, 132 Md. 16], but also (2) other persons who have no such property rights as entitle them to invoke inherent equity jurisdiction, *e. g.*, rate-payers [*Benson vs. Public Service Commission*, 141 Md. 398; *Chenoweth vs. Public Service Commission*, 143 Md. 622; *Miles vs. Public Service Commission*, 151 Md. 337. Cf. *Procter & Gamble vs. United States*, 225 U. S. 282] or taxpayers and a competitor electric company complaining of an order permitting enlargement of a municipal electric light plant [*Public Service Commission vs. Byron*, 153 Md. 464]. In the second class of cases (certainly *not* in the first) the proceeding is "of purely legislative creation" and "the statutory review provided is *sui generis*" [*Public Service Commission vs. Byron*, 153 Md. 464, 469, 474-475]. In the first class of cases these statutory provisions as to review are substantially declaratory of inherent equity jurisdiction and procedure, *e. g.*, a provision as to burden of proof (section 46 [408; *infra*, 112]), and a requirement that if new evidence is introduced it be transmitted to the Commission for consideration (section 44 [405; *infra*, 110])—an application or extension of the comity which should be observed by courts in reviewing the action of rate-making bodies. [*Prentis vs. Atlantic Coast Line*, 211 U. S. 210.] To "vacate and set aside" a rate order under section 43 [404; *infra*, 109] is equivalent to enjoining enforcement; indeed provision in the same section that "no injunction shall issue suspending or staying any order of the commission except * * * upon notice to the commission and after hearing" is a legislative recognition of the inherent equity jurisdiction by injunction.

The Court of Appeals Holds that the Courts can not Give Relief by Injunction Against Confiscation by Commission Orders, but for Relief can only Remand to the Confiscator.

By this amazing ruling even a reversal on the merits in this Court would be legally ineffectual—equivalent to a mere "advisory opinion" to a Maryland legislative agency.

After the decision of the Court of Appeals on the first appeal this ruling operated to continue in force Commission rates for four and a half months after the Court of Appeals had held them confiscatory, until the Commission after further hearings fixed new rates. The Circuit Court by its final decree on the original bill adjudged the Commission's orders and rates confiscatory and enjoined enforcement. The Court of Appeals, remarking that the decree vacated *all* orders of the Commission so far as they purport to limit the Company's rates, held that "even if in fact the eight and one-third cent rate allowed was inadequate to allow the Company a fair return on the value of its property, that fact did not • • • authorize • • • the Company to fix [its rates], for under the statute the power to do that is in the Commission alone." [R. 1625; 155 Md. 578; *infra*, 121.] After this statement are cited three Maryland cases and a statute [relating to dairy containers, evidently an erroneous citation], none of which remotely support this statement. On the contrary in one of the cases cited the Court of Appeals did exactly what it now says the courts can not do, viz., set aside Commission rates, leaving the Company free to initiate its own rates—subject of course to the continuing jurisdiction of the Commission. [*Havre de Grace Bridge Co. vs. Public Service Commission*, 132 Md. 16, 33.] This, the Court of Appeals now says, was not "authorized by anything in the statute, but if the order [of February 10, 1928] was invalid because it was • • • confiscatory • • • it should have been vacated [leaving in effect prior orders still more confiscatory] and the case remanded to the Commission, for further proceedings in accordance

with such guides, rules and standards as the Court might by appropriate order or decree direct." [R. 1626; 155 Md. 579; *infra*, 121.]

This ruling is opposed to the fundamental principle that an unconstitutional law is *not* a law; in this respect a commission order is of no greater potency than an act of Congress [*Marbury vs. Madison*, 1 Cranch 137]. The right to injunctive relief against unconstitutional acts of administrative officials—established in *Osborn vs. Bank*, 9 Wheaton, 738; early suggested by MR. JUSTICE MILLER as "the proper, if not the only mode of judicial relief" against unconstitutional rates [*Chicago, etc., Ry. Co. vs. Minnesota*, 134 U. S. 418, 460]; established in such cases against bitter opposition of state authorities in *Ex parte Young*, 209 U. S. 123—is now nowhere more firmly or more broadly established than in such rate cases [*Prentis vs. Atlantic Coast Line*, 211 U. S. 210, 230; *Oklahoma Gas Co. vs. Russell*, 261 U. S. 290, 293; *Pacific Telephone Co. vs. Kuykendall*, 265 U. S. 196, 203-205; *Railroad Commission vs. Duluth Street Railway*, 273 U. S. 625, 627-628; *Prendergast vs. New York Telephone Co.*, 262 U. S. 43, 49-50; *Smith vs. Illinois Bell Telephone Co.*, 270 U. S. 587, 591-592; *Banton vs. Belt Line Railway*, 268 U. S. 413, 418, 415-417; *Newton vs. Consolidated Gas Co.*, 258 U. S. 165, 175]. Never before has the Court of Appeals suggested doubt as to the power of Maryland Courts to *compel* submission to constitutional rights instead of remanding for relief to the legislature or the administrative officials who have violated such rights. [*Public Service Commission vs. Northern Central Railway Co.*, 122 Md. 355, 358, 392; *Public Service Commission vs. P. B. & W. R. R. Co.*, 122 Md. 438, 444.]

Injunction against enforcement of one or many *unconstitutional* rate orders in no way impairs the Commission's *continuing power* to pass new *lawful* orders. *Subject* to such *regulation* by *lawful* orders, it is still a utility's *right* "to initiate rates and, in this connection, to adopt such

policy of rate making as to it seems wise." [*United States vs. Illinois Central R. R.* 263 U. S. 515, 522.] "It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership." [*S. W. Tel. Co. vs. Public Service Commission*, 262 U. S. 276, 289. Cf. *Laird vs. B. & O. R. R. Co.*, 121 Md. 179, 190.] The power to fix rates (subject to *lawful* regulation) is part of the fundamental right to earn (through rates) a fair return. This constitutional right is no less deserving of injunctive protection than a statutory right to gamble at a race track when gambling elsewhere is a crime. [*Clark vs. Harford Agr. & Br. Ass.*, 118 Md. 608, 615, citing with approval, on the question of equity jurisdiction by injunction, *Ex parte Young*, 209 U. S. 165; *Osborn vs. Bank*, 9 Wheaton 738; *Smyth vs. Ames*, 169 U. S. 466, and other decisions of this Court.]

The State of Maryland could not by express legislative mandate to its own courts relieve those courts of the duty of protecting the rights of utilities, under the Constitution of the United States, by injunction or any other appropriate remedy available to other litigants, including race track gamblers. [*Second Employers' Liability Cases*, 223 U. S. 1, 55-59; *Truax vs. Corrigan*, 257 U. S. 312, 334-336; *Douglas vs. New Haven R. Co.*, 279 U. S. 377, 387-388.] In fact the State of Maryland has not issued any such mandate to its courts or professed to restrict their general jurisdiction to protect constitutional rights. The ruling of the Court of Appeals is based not on any of the statutory provisions relating directly to judicial review of Commission orders, but on misapprehension as to the substantive rights and duties of utilities and the Commission respectively under the Constitution of the United States and the Public Service Commission Law. Of course this Court can not review the *construction* of the Public Service Commission Law by the

Court of Appeals but will review the *constitutionality* of that law, *as construed* by the Court of Appeals.

The Court of Appeals holds that in *Ohio Valley Co. vs. Ben Avon Borough*, 253 U. S. 287, this Court meant the exact opposite of what it said and did.

In the *Ben Avon* case the Supreme Court of Pennsylvania held that on a question of confiscation the Commission's determination of facts, if supported by substantial evidence, is not reviewable by the courts, and accordingly without considering conflicting evidence sustained an order claimed to be confiscatory. This Court reversed the judgment of the Supreme Court of Pennsylvania for the sole reason that on a question of confiscation the utility is entitled to the Court's "independent judgment as to both law and facts." [*Ohio Valley Co. vs. Ben Avon Borough*, 253 U. S. 287, 289; *Bluefield Co. vs. Public Service Commission*, 262 U. S. 679, 689; *Lehigh Valley R. R. vs. Commissioners*, 278 U. S. 24, 36.] The Court of Appeals now holds that this Court "meant to say" only that where the facts are undisputed or established and the inference to be drawn from them inevitable "the courts will review any conclusion of law predicated upon such facts." [R. 1630; 155 Md. 583; *infra*, 126.] In short, this Court *meant* just what the Supreme Court of Pennsylvania *said* and *did*, and in reversing the Supreme Court of Pennsylvania this Court *said* and *did* the exact opposite of what it *meant*.

In refusing to recognize the difference between "the ascertainment of facts which rest in conflicting evidence" [R. 1630; 155 Md. 583; *infra*, 126] (1) on legislative questions within "the flexible limit of judgment which belongs to the power to fix rates" [*Atlantic Coast Line vs. N. Car. Corp. Commission*, 206 U. S. 1, 26], "committed to such agencies as public service commissions" [R. 1630; 155 Md. 583; *infra*, 126] and (2) on the constitutional question of confiscation, a judicial question which can not be committed to

any administrative agency to the exclusion of judicial review, the Court of Appeals follows Professor Dickinson [R. 1629; 155 Md. 582; *infra*, 125; Dickinson on *Administrative Justice and the Supremacy of Law*]. Professor Dickinson in his lengthy criticism of the *Ben Avon* case cites and quotes previous opinions of this Court without distinguishing statements on constitutional questions from statements on other questions,—a particularly serious error when, citing cases as involving constitutional questions, he quotes statements *not* on the constitutional question but on *other* questions. [*Southern Pacific Co. vs. Campbell*, 230 U. S. 537, 552; *Louisville & Nashville R. Co. vs. Garrett*, 231 U. S. 298, 312-319; Dickinson 179-180.]

This difference between judicial review of constitutional questions and other questions has never been questioned by any member of this Court. In the *Ben Avon* case the dissenting Justices did not question "the rule declared in [that case] which requires in confiscation cases a judicial determination on the weight of the evidence." [Mr. Justice Brandeis in *St. L. & O'Fallon R. Co. vs. United States*, 279 U. S. 461, 538.] The ground of dissent in the *Ben Avon* case was that under the laws of Pennsylvania the utility had the choice of two methods of judicial review, one unrestricted, and therefore, having chosen a limited review, could not complain. This point could not arise in the instant case; the Company has invoked the *only* remedy or remedies available under the laws of Maryland.

In the instant case, since there is no conflict of evidence as to any fact now material, the difference between the rule in the *Ben Avon* case as to judicial review in confiscation cases and the rule applicable in other cases is hardly material. The Court of Appeals, however, in the course of its opinion departs from *both* rules. After stating that "such facts as are relevant to the question before us rest for the most part in records of the Company or the Commission and are not in dispute" [R. 1631; 155 Md. 584; *infra*, 127]

the Court makes some comments, as to facts and evidence, wholly unsupported either by findings of the Commission or by evidence [*infra*, 68-69].

I.

LIMITATION BY THE COMMISSION OF THE COMPANY'S RATES TO A RETURN OF LESS THAN EIGHT PER CENT. IS CONFISCATORY; THE COMMISSION'S REASONS FOR FINDING 6.26 PER CENT. A FAIR RETURN HAVE NO TRUE RELATION TO THE FAIRNESS OF A RETURN.

The Evidence.

As the Commission's opinion indicates, there is no conflict of evidence as to what is a fair rate of return. Mr. Allen G. Hoyt, Vice-President of The National City Company in charge of public utility financing, testified on this subject briefly in the present case, at length in the valuation case and also in a case of Consolidated Gas Electric Light and Power Company of Baltimore. His testimony in the Gas Company case was without objection put in evidence in the present case, the Company offering the whole after People's Counsel had offered a part. [R. 881, 1104.] Mr. James C. Fenhagen, of Robert Garrett & Sons, also testified on this subject in the present case and Mr. Fred S. Burroughs, of Harris, Forbes & Company, in the valuation case. Mr. Nash, of Stone & Webster, and Mr. Downs, of Day & Zimmerman, who were called by the Company to testify concerning allowances for depreciation, were cross-examined about rate of return.

If investors were going to buy or build a property like the Company's they would feel that, in order to induce them to invest their money in the purchase or construction of such a property, the property would have to be expected to earn at least eight per cent. [R. 535, 543, 1143. Gas Company case, R. 1255, 1274, 1275. Valuation case, R. 1312, 1313,

1336-1337.] Taking into consideration other classes of investment with the comparative risks and return thereon—the rate of return generally required to secure proper credit for borrowing money and financing its operation—such a company as this Company should be permitted to earn eight per cent. in order that it might compete successfully for capital with other lines of industry. Eight per cent. would be the lowest rate of return that such a company as this should be permitted to earn on the value of its property in order to make its return equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties. [Gas Company case, R. 1255-1256.] The expected return would have to be at least eight per cent. in order to enlist the necessary capital to construct a utility property, even in the case of a power company or a telephone company. The credit of either a power company or a telephone company is much better than that of street railways. [Valuation case, R. 1312-1313, 1337.]

One of the hazards of utilities, especially street railways—vividly illustrated in the instant case and in the rate increases grudgingly granted in an almost continuous series of four previous rate cases and a valuation case covering a period of nine years—is the difficulty in promptly advancing their rates to overtake increases in cost of operation. [Gas Company case, R. 1258-1259, 1299-1300.] As JUDGE PARKE says, "whatever the risks of [the Company's] urban business, none is greater than its operation under less than a fair rate of return and the uncertainty that this ruinous situation will be surely, timely and adequately relieved. A failure to grant such relief invites disaster; and stinted relief often simply delays a crisis which when it arrives will prove immediately disastrous to the owners of the utility and, in the end, to the interests of the public. The position of the utility is made graver, and the public will not ulti-

mately be benefited by the ruling in the pending case since, in the opinion of the writer of this dissent, the weight of the evidence clearly and satisfactorily establishes that the Commission's limitation of the fair rate of return to 6.26 per centum of the value of its property is confiscatory and, so, unlawful. *Bluefield Company vs. Public Service Commission,* 262 U. S. 679, 694-695." [R. 1657-1658; 155 Md. 610-611; *infra,* 158.]

For some years street railway properties have *not* generally been earning eight per cent. Consequently street railway properties have *not* been and are *not* being built to any extent. [R. 1146-1147, 1148-1149, 1156.] The return earned on street railway properties has *not* been sufficient to induce investors to build street railways, or to buy them on the basis of an expected return of less than eight per cent. The return earned on street railway properties has *not* generally been equal to that generally made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties. Street railway companies have *not* been able to compete successfully for capital with other lines of industry.

In all these respects the condition and the credit of street railway companies is worse than it was before the war—worse even in 1927 than in 1922. [R. 1144, 1155-1156.] The cost to the Company of borrowed money obtained on short term notes in 1922 was 7.27 per cent., in 1927 7.32 per cent.; on long term bonds in 1922 6.75 per cent., on other long term bonds in 1927 6.93 per cent. Since July 1, 1920, the average cost to the Company of borrowed money (other than current bank loans)—more than $18,000,000 in the aggregate—was 7.23 per cent., the lowest 6.6 per cent., the last 7.32 per cent. [R. 1638, 1658; 155 Md. 591, 611; *infra,* 135, 159. Company's Exhibit No. 31, R. 1462.] This experience is quite in line with the general situation of street railways, though not of other business generally. [R. 1145-1146.] As Judge

PARKE says: "It would seem inevitable that a fair return on the property should be more than the cost of money obtained through the sale of bonds and other securities. *McCardle vs. Indianapolis Water Co.*, 272 U. S. 400, 419, 420. The clear and convincing testimony in this case is that a basic rate of 6.26 per centum is not a fair return upon the property used, nor sufficient to enable the utility to maintain its credit or to secure its necessary capital at a reasonable cost." [R. 1659; 155 Md. 612; *infra*, 159.]

The return earned by the Company on its street railway property was for the calendar year 1920 5.436 per cent., for 1921 4.858 per cent., for 1922 5.190 per cent., for 1923 5.326 per cent., for 1924 5.328 per cent., for 1925 5.487 per cent. and for 1926 5.525 per cent. [Company's Exhibit No. 6C; R. 1398.] Proper allowance for depreciation would make all these percentages still lower.

The necessity that a utility—even one with less hazard and better credit than a street railway—be permitted to earn a return of not less than 8 per cent. is illustrated by the Conowingo project, the new dam in the Susquehanna (in Maryland) from which electricity is transmitted to Philadelphia. As an independent undertaking the Conowingo project could not have been financed on its own credit on an expected *maximum* return of either 7 or 8 per cent. [Gas Company case, R. 1259, 1261-1262.] It was financed *not* on a 7 per cent. *return* but on a 7 per cent. *lease* on the ultimate credit of the Philadelphia Electric Company. Financially the Conowingo project is a part of the Philadelphia Electric system, and the Conowingo securities, *both bonds and stocks*, are *underlying securities* of the Philadelphia Electric system, secured by the Philadelphia Electric Company, guarantor of the lease. Of course an additional *part* of an established system can be financed on *borrowed* capital through *preferred* securities, whether bonds, preferred stock or guaranteed stock, on a return of less than 8 per cent. If the additional *part* is not too large in proportion

to the whole and is *properly secured* on the *credit* of the *whole*, then the *part* ought to be financed on the credit of the whole at *considerably less than the average return on the whole*. What the Philadelphia Electric system as a whole, including Conowingo, will be permitted to earn remains to be seen.

The Law.

Although "the question of the minimum of a fair percentage on value is shown to vary with the circumstances" [*Dayton-Goose Creek Ry. vs. United States*, 263 U. S. 456, 486], the decisions of this Court, and its practice of citing not only its own previous decisions but also decisions of lower courts on this question, show that the *relevant* circumstances do not defy rational quest and are in no sense secrets, kept *in gremio* by commissions, beyond judicial ken.

In *Bluefield Co. vs. Public Service Commission*, 262 U. S. 679, this Court discusses what is a fair rate of return in the constitutional sense, *i. e.*, what is non-confiscatory, reviews and distinguishes pre-war cases declining to hold 6 per cent. confiscatory, quotes the *Lincoln Gas Co.* case holding as "a matter of common knowledge * * * that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future" and cites with apparent approval a District Court case holding 8 per cent. a fair *(i. e.*, non-confiscatory) rate of return and a Circuit Court of Appeals case holding 7½ per cent. *not excessive*. The opinion in the *Bluefield* case, which not only contrasts sharply in method but also conflicts directly on specific points with the opinions of the Commission and the Court of Appeals in the instant case, may appropriately be quoted at length:

"The state commission found that the company's net annual income should be approximately $37,000, in order to enable it to earn 8 per cent. for return and depreciation upon the value of its property as fixed by it. Deducting 2 per cent. for depreciation, there remains 6 per cent. on $460,000, amounting to $27,600 for return. This was approved by the state court.

"The company contends that the rate of return is too low and confiscatory. What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

"In 1909, this Court, in *Willcox vs. Consolidated Gas Co.*, 212 U. S. 19, 48-50, held that the question whether a rate yields such a return as not to be confiscatory depends upon circumstances, locality and risk, and that no proper rate can be established for all cases; and that, under the circumstances of that case 6 per cent. was a fair return on the value of the property employed in supplying gas to the City of New York, and that a rate yielding that return was not confiscatory. In that case the investment was held to be safe, returns certain and risk reduced almost to a minimum—as nearly a

safe and secure investment as could be imagined in regard to any private manufacturing enterprise.

"In 1912, in *Cedar Rapids Gas Light Co. vs. Cedar Rapids,* 223 U. S. 655, 670, this Court declined to reverse the state court where the value of the plant considerably exceeded its cost, and the estimated return was over 6 per cent.

"In 1915, in *Des Moines Gas Co. vs. Des Moines,* 238 U. S. 153, 172, this Court declined to reverse the United States District Court in refusing an injunction upon the conclusion reached that a return of 6 per cent. per annum upon the value would not be confiscatory.

"In 1919, this Court in *Lincoln Gas Co. vs. Lincoln,* 250 U. S. 256, 268, declined on the facts of that case to approve a finding that no rate yielding as much as 6 per cent. on the invested capital could be regarded as confiscatory. Speaking for the Court, MR. JUSTICE PITNEY said:

'It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance was adopted, and largely since this cause was last heard in the court below. And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future.'

"In 1921, in *Brush Electric Co. vs. Galveston,* the United States District Court held 8 per cent. a fair rate of return.[4]

"In January, 1923, in *Minneapolis vs. Rand,* the Circuit Court of Appeals of the Eighth Circuit (285 Fed. 818, 830) sustained, as against the attack of the city on the ground that it was excessive, 7½ per cent., found by a special master and approved by the District

[4] This case was affirmed by this Court June 4, 1923, *ante,* 443.

Court as a fair and reasonable return on the capital investment—the value of the property.

"Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. *The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit,* and *the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it.* In this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved. For example, the average rate of return on the total cost of the property from 1895 to 1915, inclusive, was less than 5 per cent.; from 1911 to 1915, inclusive, about 4.4 per cent., without allowance for depreciation. In 1919 the net operating income was approximately $24,700, leaving $15,500, approximately, or 3.4 per cent. on $460,000 fixed by the commission, after deducting 2 per cent. for depreciation. In 1920, the net operating income was approximately $25,465, leaving $16,265 for return, after allowing for depreciation. Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent. upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service." (Italics ours.)

Bluefield Co. vs. Public Serv. Comm., 262 U. S., 679, 692-695.

In *Galveston Electric Company vs. Galveston,* 258 U. S. 388, 400, a return of 8 per cent. was assumed as the limit to escape confiscation.

In *Landon vs. Court of Industrial Relations,* 269 Fed. 433, 445, a return of 8 per cent. was held necessary to escape confiscation.

In *Mobile Gas Co. vs. Patterson,* 293 Fed. 208, 221, it was held that rates fixed by the Alabama Public Service Commission were confiscatory and that the plaintiff was entitled to earn 8 per cent. upon the value of its property. [The portion of the decree that adjudged the rates confiscatory and enjoined enforcement was affirmed by this Court. *Patterson vs. Mobile Gas Co.,* 271 U. S. 131.]

In *Southwestern Bell Tel. Co. vs. City of Fort Smith,* 294 Fed. 102, 108, it was held that a fair return would be 8 per cent. This case was affirmed by this Court with the following *per curiam* opinion:

> "Affirmed with costs, upon the authority of *Newton vs. Consolidated Gas Co.,* 258 U. S. 165, 175; *Galveston Electric Co. vs. City of Galveston,* 258 U. S. 388, 395; *State of Missouri ex rel. Southwestern Bell Telephone Co. vs. Public Service Commission of Missouri,* 262 U. S. 276, 287; *Georgia Ry. & Power Co. vs. Railroad Commission of Georgia,* 262 U. S. 625, 631; *Bluefield Water Works & Improvement Co. vs. Public Service Commission of West Virginia,* 262 U. S. 679, 690."
>
> *City of Fort Smith vs. Southwestern Bell Telephone Co.,* 270 U. S. 627.

In *New York Telephone Co. vs. Prendergast,* 300 Fed. 822, the statutory court for southern New York (Circuit Judge Hough and District Judges Knox and Winslow), granting a preliminary injunction against enforcement of a commission order fixing telephone rates claimed to be confiscatory, said:

> "The rate of return on property is a matter of custom and custom is fundamentally opinion.
>
> "Admittedly it is and has been customary to allow as a reasonable rate of return for regulated businesses like this one, 8 per cent. The justification for the custom is the habit of business men, and a departure therefrom is not right because a court or commission prefers a lower rate. Reasons are wanted, and none are set forth in this record. Under such circumstances

there is no presumption of correctness attaching to the 7 per cent. limit. The question always raised in rate cases is this: What rate of return, with due regard to certainty and security, will attract the intelligent investor? It remains to be seen whether a departure from the present customary rate is warranted by modern conditions."

300 Fed. 826.

In *Southern Bell Tel. & Tel. Co. vs. Ry. Comm. of S. C.*, 5 F. (2d) 77, 89, decided by JUDGE COCHRAN, the special master, reviewing most of the cases here cited, found that the complainant's net income should be 8 per cent. upon the value of its property.

In *Brooklyn Union Gas Co. vs. Prendergast,* 7 F. (2d) 628, 672, JUDGE CAMPBELL held that any rate of return lower than 8 per cent. would be confiscatory. The decree in that case was modified and affirmed by this Court, which said: "The decrees [in *King's County Lighting Co. vs. Prendergast,* 7 F. (2d), 192, and *Brooklyn Union Gas Co. vs. Prendergast,* 7 F. (2d) 628] will be modified by excluding therefrom such parts as adjudge the statute invalid for any reason [viz., 650 B. t. u. standard or impairment of contract obligation] except conflict with the Fourteenth Amendment because confiscatory in effect. Thus modified, both are affirmed." [*Ottinger vs. Brooklyn Union Co.,* 272 U. S. 579, 581.]

Each of the eight cases just cited on the question of confiscation—and two others also cited in the above quotation from *Bluefield Co. vs. Public Service Commission,* 262 U. S. 679—were cited on the same question with apparent approval in *McCardle vs. Indianapolis Water Co.,* 272 U. S. 400, 419-420, in which this Court said:

"The Commission, November 28, 1923, in No. 7080, found seven per cent. to be a reasonable rate of return. It stated that was the rate the city's appraiser, Mr. E. W. Bemis, testified to be reasonable. At the trial,

the company introduced testimony supporting higher rates. Mr. Hagenah and Mr. Elmes testified that eight per cent. was a reasonable rate of return. Mr. Metcalf, consulting engineer for the company, supported a rate from 7.5 per cent. to eight per cent. Appellants offered a study by Mr. E. W. Bemis of the rates of yield to investors on certain public utility bonds. He took into account 524 flotations put out at different times between July, 1921, and February, 1924, inclusive. The average yield in the last six months of 1921 was 7.33 per cent., and in February, 1924, 6.11 per cent. The trend was not downward throughout the whole period. It was upward from the last half of 1922 through all of 1923. And he testified that there should be added .4 of one per cent. to cover brokerage. It is obvious that rates of yield on investments in bonds plus brokerage are substantially less than the rate of return required to constitute just compensation for the use of properties in the public service. Bonds rarely constitute the source of all the money required to finance public utilities. And investors insist on higher yields on stock than current rates of interest on bonds. Obviously, the cost of money to finance the whole enterprise is not measured by interest rates plus brokerage on bonds floated for only a part of the investment. The evidence is more than sufficient to sustain the rate of seven per cent. found by the Commission. And recent decisions support a higher rate of return.[4]

"• • • As indicated above, a reasonable rate of return is not less than seven per cent."

In the instant case the majority opinion of the Court of Appeals actually confuses the opinion of this Court in the *Indianapolis* case with the dissenting opinion, ignores the

[4] *Lincoln Gas Co. vs. Lincoln*, 250 U. S. 256, 268; *Galveston Elec. Co. vs. Galveston*, 258 U. S. 388, 400; *Bluefield Co. vs. Pub. Serv. Com.*, 262 U. S. 679, 692 *et seq*; *Landon vs. Court of Industrial Relations*, 269 Fed. 433, 445; *Minneapolis vs. Rand*, 285 Fed. 818, 830; *Mobile Gas Co. vs. Patterson*, 293 Fed. 208, 221; *Southwestern Bell Telephone Co. vs. City of Fort Smith*, 294 Fed. 102, 108; *New York Telephone Co. vs. Prendergast*, 300 Fed. 822, 826; *Southern Bell Tel. & Tel. Co. vs. Railroad Commission*, 5 F. (2d) 77, 89; *Brooklyn Union Gas Co. vs. Prendergast*, 7 F. (2d) 628, 672.

statement last quoted and calls the *negation* of this statement in the dissenting opinion an "interpretation" of this Court's opinion. [R. 1646; 155 Md. 599; *infra*, 144.]

In *Railroad Commission vs. Duluth Street Railway*, 273 U. S. 625, this Court affirmed a decree of the District Court holding confiscatory certain street car fares fixed by the Commission. In that case the Commission found that a return of 7½ per cent. was a reasonable rate of return [273 U. S. 627] and the master and the District Court found the same rate as the limit of confiscation. [*Duluth St. Ry. Co. vs. Railroad and Warehouse Commission of Minnesota*, 4 F. (2d), 543, 550.]

In *Consolidated Gas Co. of New York vs. Prendergast*, 6 F. (2d) 243, the Court, confirming the report of the special master, held that a reasonable (*i. e.*, non-confiscatory) rate of return according to well recognized custom in a regulated business like that of a gas company is not less than 8 per cent. Both the master and the Court in their opinions distinguished, (as this Court afterwards did in the *Indianapolis Water Company* case), between rate of *return on property* and *distributed return on stocks and bonds*—a distinction confused by the Court of Appeals in the instant case [R. 1640; 155 Md. 593; *infra*, 137-138]. The master in his opinion said:

> "The plaintiff is entitled to a fair and reasonable return upon the present value of its property used and useful in the service of its gas consumers. *Bluefield Waterworks Co.* case, supra; *Southwestern Bell Telephone* case, supra, and cases cited. If the investors were going to buy or build a property like that of the complainant, what amount would they feel that the property should earn in order to induce them to invest their money in the purchase or construction of such a property? Taking into consideration other classes of investment in this locality, with the comparative risks and return thereon, the rate of return generally required to secure proper credit for borrowing money

and financing its operations, what should a utility company subject to state regulation be permitted to earn in order that it might compete successfully with other businesses and be on a parity with them?

"There seems to be some misunderstanding on the part of the defendant attorney general as to the meaning of the rate of return referred to by the court. His apparent contention is that it means the amount the plaintiff should pay in the way of interest on bonds and dividends on stock, and on that theory he offered proof as to loans made to and by various corporations and the rate at which they were made, and proofs as to the selling price of various stocks and bonds and the yield thereon. My understanding is that it relates entirely to the return the corporation itself must earn over and above the cost of operation and taxes before it makes any distribution to its stockholders or bondholders. A corporation does not ordinarily expect to pay out all its earnings in the shape of dividends, and, if it is successfully operated, certainly it would not be obliged to pay them out for interest on its obligations. Good business management requires that disbursements of this character should absorb only a portion of its earnings, and some part should be carried to surplus account. It is these earnings, and not the amount disbursed to bond or stockholders, with which the courts are concerned in passing upon the confiscatory character of the rate. Just what this rate should be is not a fixed and established matter, applicable alike to all classes of investment and all sections. Business men discriminate between investments, and rates of interest and return vary. As was said by the statutory court in *New York Telephone Co. vs. Public Service Commission:* 'The rate of return on property is a matter of custom, and custom is fundamentally opinion. Admitting it is and has been customary to allow as a reasonable rate of return for a regulated business like this one 8 per cent., the justification for the custom is the habit of business men, and a departure therefrom is not right because a court or a commission prefers a lower rate. * * * The question always raised in rate cases is this: What rate of return, with due regard to certainty and security, will attract the intelligent investor?'

"On this subject the plaintiff introduced the evidence of two witnesses, Mr. Allison, consulting engineer and advisor of banks and investors in public utility business and management, and Mr. Hoyt, Vice-President in charge of public utility investments of the National City Company of this city. Their familiarity and qualifications for testifying on the subject were proven. Both had large experience with the subject and both testified that the plaintiff should receive a return of 8 per cent. on the present cost to build or buy the property; that this amount would be required, and even more, to interest capital in a public utility such as the plaintiff.

"While, of course, there is no guaranty on the part of the public authorities, or anyone else, that a public utility should be successful, yet if it could earn a proper return on the value of its property in the business, without regulations or statutes preventing them so doing, then such regulations or statutes operate to deprive the company of its property without justification and are confiscatory. The defendants claim that 6 per cent. return would be sufficient in this case to prevent the statute being obnoxious to the constitutional provision, mainly because the Supreme Court, in *Willcox vs. Consolidated,* supra, held in 1906 that such a return was not confiscatory on the facts in that case, although counsel for the Public Service Commission contended that this rate of return was also within the decision in *Newton vs. Consolidated Gas Co.,* 258 U. S. 165, 42 S. Ct. 264, 66 L. ed. 538, and other cases.

"With the decreased value of the dollar and the changing conditions in the business and financial world, due to the World War, the fact that a return of 6 per cent. in 1906 was held not confiscatory is not authority for holding that at the present time and under the present conditions it would still apply. While it is true that in the years past various rates, ranging from 6 per cent. in the first Consolidated Gas case to 8 per cent. in the latest cases, have been used to determine the confiscatory character of the return, the more recent cases, and those decided under present conditions, have uniformly tended to a higher rate. *Bluefield Co. vs. Pub-*

lic Service Commission, supra; *Minneapolis vs. Rand*, (C. C. A.) 285 F. 818, 830; *Galveston Electric Co. vs. Galveston*, 258 U. S. 388, 42 S. Ct. 351, 66 L. ed. 678; *Bronx Gas and Electric Co. vs. Pub. Serv. Comm.*, 190 App. Div. 13, 180 N. Y. S. 38. I find that 8 per cent. is a rate customarily required in the locality to be earned on the present value of the property of a regulated public utility, and that the plaintiff should be permitted to earn at least this amount."

6 F. (2d) 273-274.

The Court in its opinion said:

"It is also the court's conclusion that at the present time a reasonable rate of return, according to well-recognized custom in a regulated business like this, is not less than 8 per cent. The rate of return on the property is not to be confounded with the amount of dividends that a corporation might pay on its capital stock. Indeed, according to all successful business experience, a corporation paying out in dividends all or even the major part of its net earnings is courting speedy disaster. 'The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.' *Bluefield Water Works & Imp. Co. vs. Pub. Serv. Comm. of W. Va.*, 262 U. S. 679, 692, 693, 43 S. Ct. 675, 679 (67 L. ed. 1176)."

6 Fed. (2d) 280-281.

The decree in this case was modified and affirmed by this Court, which said: "The decree of the District Court will be modified by excluding therefrom those parts which declare the Act invalid for any reason [viz., alleged impairment of contract obligations and impossible 650 B. t. u. standard] except that enforcement would result in confiscation. Thus modified, it is affirmed."

Ottinger vs. Consolidated Gas Co., 272 U. S. 577, 579.

In *Alton Water Co. vs. Illinois Commerce Commission,* 279 Fed. 869, in an opinion holding confiscatory a commission order fixing water rates, the Court said:

> "It has been held that no rate of return can be deemed reasonable which is not high enough to attract capital to the form of investment involved in utility properties, such as complainant's. *Lincoln Gas & Electric Co. vs. Lincoln,* 250 U. S. 256, 39 Sup. Ct. 454, 63 L. ed. 968. A return of 8 per cent. upon the fair value has been held to be reasonable."
>
> 279 Fed. 873.

In *Louisiana Water Co. vs. Public Service Commission,* 294 Fed. 954, in holding confiscatory a commission order fixing water rates, the Court said:

> "Moreover, no rate of return can be deemed reasonable which is not high enough to attract capital to the form of investment involved in utility properties, and a return of 8 per cent. upon the fair value of such utility properties has been held to be reasonable. *Alton Water Co. vs. Illinois Commerce Commission* (D. C.) 279 Fed. 869, loc. cit. 873; *City of Toledo vs. Toledo Rys. & Light Co.,* 259 Fed. 450, loc. cit. 455, 170 C. C. A. 426."
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> 294 Fed. 957.

In *New York Telephone Co. vs. Prendergast,* 11 F. (2d) 162, the statutory court, (CIRCUIT JUDGES ROGERS and MANTON and DISTRICT JUDGE AUGUSTUS N. HAND), referring to the prior decision in *New York Telephone Co. vs. Prendergast,* 300 Fed. 822, [*supra,* 36-37], said:

> "The commission stated that the rates fixed by its orders were intended to yield a net return to plaintiff of only 7 per cent., and this court held this was error; it being customary to allow as a reasonable rate of return for regulated business like this one 8 per cent., unless a departure from that rate should be shown to be warranted."
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> 11 F. (2d) 163.

In *New York and Queens Gas Co. vs. Prendergast,* 1 F. (2d) 351, 370, (appeal dismissed, 268 U. S. 708), the special master expressed his opinion that under the evidence and the decisions the plaintiff might properly claim a return of 8 per cent. on the present value of its property.

In *King's County Lighting Co. vs. Prendergast,* 7 F. (2d) 192, 218, [modified and affirmed, *Ottinger vs. Brooklyn Union Co.,* 272 U. S. 579, 581, *supra* 37] the statutory court for eastern New York (CIRCUIT JUDGE MANTON and DISTRICT JUDGES CAMPBELL and INCH) in an opinion by JUDGE MANTON held that any rate of return lower than 8 per cent. would be confiscatory.

In *New York & Richmond Gas Co. vs. Prendergast,* 10 F. (2d) 167, decided by the statutory court for eastern New York (CIRCUIT JUDGE MANTON and DISTRICT JUDGES CAMPBELL and INCH), the master in his opinion said:

> "The fair return to which this plaintiff is constitutionally entitled is to be computed on the present value of its used and useful property, over and above all expenses of operation, including the cost of maintenance and taxes. Such return should be such as to yield net earnings sufficient to attract careful and conservative investors, and should be at least equal to the return ordinarily allowed in similar lines of business activity and investment.
>
> "The parties hereto have submitted a number of authorities in which the courts, in various parts of the country, have fixed rates varying considerably in amount. The state and federal courts, in the gas rate cases in this and the adjoining districts, have, however, held that a sufficient and proper rate of return on the property used in this class of enterprise is not less than 8 per cent. of the value of the property used and useful in the manufacture of gas, and I feel it only fit and proper that this company should be placed on a parity with such other companies to the extent of its rate of return.

"I may add that the proofs in this case fully confirm the fact, which is well within the common knowledge of residents of the borough of Richmond, as to the urgent need that this plaintiff gas company shall be permitted to earn at all times an adequate rate of return, to the end that it may be able to attract freely the substantial quantities of new capital which are necessary for its normal growth. The welfare of this company and of the communities which it serves are shown to have been seriously prejudiced, at times, by the inability of the company to charge rates yielding net earnings which induce ready contributions of new capital for additions to plant and extensions of mains and facilities. Curtailment of the company's earnings below an adequate return would be no boon to this Richmond territory.

"For the purpose of this case, I fix 8 per cent. as a moderate and reasonable rate of annual return, if figured upon the present value of the plaintiff's property as hereinbefore found. Whether a larger return should be allowed by the rate-making body, I express no opinion here."

10 F. (2d) 186-187.

On this point the Court in its opinion said:

"In *King's County Light & Gas Co. vs. Prendergast*, supra, we approved a rate of return of not less than 8 per cent. as a reasonable rate of annual return. We think that return on the property of the plaintiff would be a fair return on an investment, and approve the conclusion of the master as to it also."

10 F. (2d) 209.

In *Springfield Gas & Electric Co. vs. Pub. Serv. Comm.*, 10 F. (2d) 252, in an opinion holding confiscatory a commission order fixing gas rates, the Court said:

"The rate of return asked by plaintiff is 8½ per cent. That plaintiff is entitled to such a return as will be reasonably sufficient to insure confidence in the financial soundness of the utility is beyond question. Under the testimony 8 per cent. appears to be a reasonable and fair return. Such return is in like manner sus-

tained under the law. *Bluefield Co. vs. Public Service Comm'n.*, 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176; *Joplin Gas Co. vs. Public Service Comm'n.* (D. C.) 296 F. 271; *Missouri ex rel. S. W. Telephone Co. vs. Public Service Comm'n.*, 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807; *Alton Water Co. vs. Illinois Commerce Comm'n.* (D. C.) 279 F. 869. There was some testimony, however, that 8½ per cent. would be a fair and proper return."

10 F. (2d) 255.

In *Houston Electric Company vs. City of Houston*, 265 Fed. 360, 365, the master's report, confirmed by the court, held that a fair rate of return would be eight per cent.

In *Pacific Gas Co. vs. San Francisco*, 265 U. S. 403, decided June 2, 1924, the question was whether certain gas rates fixed by ordinances for the fiscal years beginning July 1, 1913, 1914 and 1915 were confiscatory. The master found on the evidence that a return of 7 per cent. was necessary in order to avoid confiscation. The District Judge adhered to a former opinion of his own in another case holding 6 per cent. not confiscatory. [*Pacific G. & E. Co. vs. City and County of San Francisco*, 273 Fed. 937, 943-946; *Spring Valley W. Co. vs. City and County of San Francisco*, 252 Fed. 979, 987-989.] This Court, approving the finding of the master and not the opinion of the District Judge, said:

"We think the evidence supports the finding that a net return of seven per centum was necessary in order to avoid confiscation."

265 U. S. 405.

This decision of this Court that in 1913, 1914 and 1915 a return of less than 7 per cent. was confiscatory is consistent with the recent decisions of lower courts—including the six cited by this Court in the *Indianapolis* case—holding that *now* a return of less than 8 per cent. would be confiscatory.

In *Brooklyn Borough Gas Co. vs. Prendergast* 16 F. (2d) 615, 622, 638, the master and the statutory court for eastern New York (CIRCUIT JUDGE MANTON and DISTRICT JUDGES CAMPBELL and INCH) in an opinion by JUDGE MANTON held the plaintiffs entitled to earn an 8 per cent. return. The Court in its opinion said that such a rate is permissible under the *Indianapolis Water Company* case.

In *United Gas Co. vs. Railroad Commission,* 278 U. S. 300, 312, 319, and *United Gas Co. vs. Public Service Commission,* 278 U. S. 322, 325-326, a reasonable rate of return was found by the lower courts, and assumed by this Court, to be 8 per cent.

In *Idaho Power Company vs. Thompson,* 19 F. (2d) 547, 573-574, the statutory court for Idaho (CIRCUIT JUDGE RUDKIN and DISTRICT JUDGES DIETRICH and CUSHMAN), emphasizing "evidence of the strength and safety of plaintiff's investment," concluded that under the circumstances the element of risk "must here be held to be relatively small" and was "unable to conclude that under such circumstances rates yielding a return of 7 per cent. or over" would be confiscatory. In *Columbus Gas and Fuel Company vs. City of Columbus,* 17 F. (2d) 630, 641, a return of 7.078 per cent. was found to be non-confiscatory.

In *Monroe Gaslight and Fuel Co. vs. Michigan Public Utilities Commission,* 11 F. (2d) 319, 325, the statutory court for eastern Michigan (CIRCUIT JUDGE DENISON and DISTRICT JUDGES TUTTLE and SIMONS) held that under circumstances mentioned in the opinion "and particularly with the declared willingness of the Commission to allow a return of 8 per cent. as this may be brought about by an increased volume of business and by more efficiency" a 7 per cent. return would not be confiscatory.

In *Pacific Telephone and Telegraph Company vs. Whitcomb,* 12 F. (2d) 279, 286-287 [affirmed, *Denney vs. Pacific T. & T. Co.,* 276 U. S. 97], the statutory court for Washington

(CIRCUIT JUDGE RUDKIN and DISTRICT JUDGES NETERER and WEBSTER) overruled exception to the special master's conclusion that a return of less than 7½ per cent. would be confiscatory.

In *Interborough Rapid Transit Co. vs. Gilchrist,* 26 F. (2d) 912, 924 [reversed on other grounds, *Gilchrist vs. Interborough Co.,* 279 U. S. 159, 210], the statutory court for southern New York (CIRCUIT JUDGE MANTON and DISTRICT JUDGES KNOX and BONDY), assumed as settled by the authorities in point that the utility is entitled to a return of eight per cent. to avoid confiscation, and cited in support of this assumption four of the authorities cited above.

In *Cambridge Electric Light Co. vs. Atwill,* 25 F. (2d) 485, 487-488, the statutory court for Massachusetts (CIRCUIT JUDGE BINGHAM and DISTRICT JUDGES MORTON and MORRIS) in an opinion by JUDGE MORTON said they were "not at present satisfied that a return of less than 8 per cent. would *ipso facto* be confiscatory," or that the return that would actually be obtained would be of that character; and "these points should await final hearing." In *Worcester Electric Light Co. vs. Atwill,* P. U. R. 1929 B 1, 82, the master, appointed after a preliminary injunction had been granted by the statutory court for Massachusetts (CIRCUIT JUDGES BINGHAM and JOHNSON and DISTRICT JUDGE LOWELL) [23 F. (2d) 891], held that the evidence sustained 8 per cent. as the rate of return which the plaintiff was entitled to earn, and that this also seems to be in accord with recent decisions.

In *Middlesex Water Co. vs. Board of Public Utility Commissioners,* 10 F. (2d) 519, 529, [appeal dismissed, 275 U. S. 483], decided by the statutory court for New Jersey, (CIRCUIT JUDGE DAVIS and DISTRICT JUDGES RELLSTAB and CLARK), a return of 7½ per cent. was fixed by the Board and adopted by the master.

In *Plainfield-Union Water Co. vs. Board of Public Utility Commissioners,* 30 F. (2d) 846, 856, 858, the master held the plaintiff entitled to a return of 7½ per cent. and the Court said: "Obviously, 7½ per cent. is but a reasonable return upon a utility investment." The Circuit Court of Appeals for the Third Circuit "after a thorough investigation" declared itself "in entire accord on the law and findings of fact with what was done in the court below." [*Board of Public Utility Commissioners vs. Plainfield-Union Water Co.,* 30 F. (2d) 859. Certiorari denied, 279 U. S. 858.]

In *Los Angeles Ry. Corporation vs. Railroad Commission,* 29 F. (2d) 140, 147, [No. 60 in this Court on appeal], the statutory court for southern California (CIRCUIT JUDGE HUNT and DISTRICT JUDGES JAMES and SAWTELLE) included an 8 per cent. return as part of the "total cost of service" to be met by rates.

In *Vincennes Water Supply Co. vs. Public Service Commission,* 34 F. (2d) 5, 9 [No. 197 in this Court on petition for certiorari to the Circuit Court of Appeals for the Seventh Circuit], the parties stipulated that 7 per cent. was a proper return and the Circuit Court of Appeals remarked that "the stipulation is in accord with the decision of the Supreme Court as to what is a proper return upon public utility properties."

In *Queens Borough Gas & Electric Co. vs. Prendergast,* 31 F. (2d) 339, 364, 373, the master found the rate of return to which the plaintiff was entitled to be not less than 8 per cent.; the statutory court for eastern New York (CIRCUIT JUDGE SWAN and DISTRICT JUDGES CAMPBELL and INCH) in an opinion by JUDGE SWAN held the rate in question confiscatory but "without in any sense intimating any disagreement with [the master's] conclusions as to the evidence or the law" found it unnecessary for the court to go into the question of rate of return.

In *Greencastle Water Works Co. vs. Public Service Commission,* 31 F. (2d) 600, 606, the statutory court for Indiana (CIRCUIT JUDGE ALSCHULER and DISTRICT JUDGES BALTZELL and SLICK) in an opinion by JUDGE BALTZELL "upon all the evidence" found that a return of 6½ per cent. would not be confiscatory and enjoined, as confiscatory, rates yielding less. The opinion does not mention any evidence or cite any authority as to whether or not a return of 6½ per cent. would be confiscatory.

In *Louisville Railway Co. vs. City of Louisville,* F. (2d) , decided September 28, 1929, in the district court for western Kentucky, the Court in its opinion said:

> "* * * plaintiff is entitled to a fair and reasonable return measured by the rate of return generally made in this part of the country on other business undertakings which are attended by corresponding risks and uncertainties. This return should be sufficient to assure confidence in the financial stability and soundness of the investment, and should be adequate, under efficient and economical management, to maintain and support its credit and to enable it to raise the money necessary for the proper discharge of its public function. I am satisfied that, measured by this rule and by the evidence in this case, any return less than 8 per cent. would not be fair and reasonable. In this view I think I am supported by the cases of *McCardle vs. Indianapolis Water Company,* 272 U. S. 400; *Lincoln Gas Company vs. Lincoln,* 250 U. S. 256; *Galveston Electric Company vs. Galveston,* 258 U. S. 388; *Bluefield Company vs. Public Service Commission,* 262 U. S. 679, and numerous cases from the lower federal courts."

In *New York Telephone Co. vs. Prendergast,* in a report filed March 11, 1929, in the federal court for southern New York, the master finds that the return the plaintiff is entitled to earn is 8 per cent., that the decisions hold an 8 per cent. return the usual and customary rate to be allowed public utilities in this part of the country, and that the evidence is sufficient to sustain a finding that an 8 per cent.

return should be allowed the plaintiff [35 Rate Research 29, 31-32].

In *West Palm Beach Water Co. vs. City of West Palm Beach,* in a report filed June 12, 1929, in the federal court for southern Florida, the master finds that the return the plaintiff is entitled to be allowed, fully established by the evidence, is 8 per cent. [35 Rate Research 115, 126-127].

In *Chesapeake & Potomac Telephone Co. vs. Whitman,* 3 F. (2d) 938, 953-954, the statutory court for Maryland (CIRCUIT JUDGE ROSE and DISTRICT JUDGES GRONER and SOPER) in an opinion by JUDGE ROSE held non-confiscatory a return of 6 per cent. *plus* a part of substantial payments (charged to operating expenses) under contract to the American Telephone & Telegraph Company for financial assistance, which enabled the plaintiff to secure capital at lower rates than if it stood alone and without which the court "might well doubt" the sufficiency of a 6 per cent. return. The opinion is expressly based on facts, peculiar to that case, which (correctly or not) were deemed sufficient to distinguish the case from all previous reported cases—and therefore are sufficient to distinguish it from the instant case. Evidently the courts generally have so regarded that case, which has never been cited on the question of rate of return by this Court or any federal court.

It has *not* been held that limitation of steam railroad rates to a *maximum* return of 6 per cent. or less than 8 per cent. is non-confiscatory. The "recapture" provisions of Transportation Act, 1920, do *not* limit the return of every railroad or any particular railroad to *5½ per cent., or 6 per cent., or 8 per cent., or any maximum at all.* The act tentatively fixed the *average* return for *all* railroads *as a whole* at 5½ per cent., plus ½ per cent. in the discretion of the commission. Any rates inevitably yield the *strong* railroads a return much *larger,* and the *weak* railroads a return much *smaller,* than the *average* return. The recapture pro-

visions require the strong railroads to surrender only half of the excess of their *actual* return over the fixed *average*, thus leaving them the fixed average *plus half* of the excess of their actual return over the average. Of course *each* individual railroad has its redress in the courts, if in practice the fixed *average* return *plus half* of the *actual* excess falls short of its constitutional right. In fact in the only cases decided by this Court involving the recapture provisions the *actual* return to the railroad *after* paying over one-half of the excess earnings was not less than 8 per cent.

In *Dayton-Goose Creek Ry. vs. United States,* 263 U. S. 456, 486, this Court said:

> "The act fixed the fair return for the years here involved, 1920 and 1921, at five and a half per cent. and the Commission exercises its discretion to add one-half a per cent. * * * Here we are relieved from considering the line between a fair return and confiscation, because under the provisions of the act and the reports made by the appellant the return which it will receive after paying one-half the excess to the Commission will be about 8 per cent. on the reported value."

In *St. Louis & O'Fallon Ry. Co. vs. United States,* 22 F. (2d) 980, 984, [reversed 279 U. S. 461, 487], the actual return *after* recapture, computed on the highest disputed valuation, *i. e.*, the railroad's own, was for 1920 6.97 per cent., for 1921 8.71 per cent., for 1922 8.29 per cent. and for 1923 8.43 per cent., *i. e.*, a return of *more than 8 per cent.* for the entire four-year period in question. Even this recapture was held invalid by this Court, because beyond the statutory authority granted the Commission. [*St. L. & O'Fallon Ry. Co. vs. United States,* 279 U. S. 461, 488.] In short, the act does *not* authorize recapture of all income in excess of the constitutional minimum necessary to escape confiscation; on the contrary it secures, to railroads generally, *more* than their minimum constitutional right. [*Dayton-Goose Creek Ry. vs. United States,* 263 U. S. 456, 479-480.]

Throughout the United States weak railroads are paralleled by and in competition with strong railroads. Legally the weak railroads are not, economically they are, limited to the same rates as their strong competitors. The same rate may be confiscatory as to a weak railroad but not as to its strong competitor. [*Missouri Rate Cases,* 230 U. S. 474, 508-509.] The constitution protects a railroad against *legal* limitation of its own rates but not against *legal* limitation of a competitor's rates which *economically* limit its own. [*Dayton-Goose Creek Ry. vs. United States,* 263 U. S. 456, 481; *Aetna Insurance Co. vs. Hyde,* 275 U. S. 440, 446-447.] If the rates of *each* railroad were *legally* limited to a constitutional minimum return, only the strong railroads would actually receive such a return; the rates and returns of the weak railroads would be economically limited so that their *actual* returns would be much less than the constitutional *permitted* return. Congress recognized and avoided this by allowing the strong railroads *more* than their minimum constitutional right, thereby assuring the weak railroads *more* than they actually would get as the economic result of limiting their strong competitors to the constitutional minimum. The act itself declares that "because it is impossible to establish uniform rates upon competitive traffic which will adequately sustain all the carriers needed to do the business, without giving some of them a net income in excess of a fair return, any carrier receiving such excess shall hold it" in the manner prescribed [263 U. S. 476].

In view of the national character of steam railroads' business, this *affirmative* protection by Congressional legislation, and the long standing, justified by the event, of railroad securities as the highest grade of American investments except Government securities, the Company's position in the instant case would not be affected even if it were held that a fair *minimum* return for steam railroads, *i. e.,* a return necessary to attract capital, is materially less than a

fair return for street railways and may be materially less than 8 per cent.

The authorities above cited (believed to include all reported federal court cases on rate of return in recent years) show that, although "the question of the minimum of a fair percentage on value" varies "with the circumstances" [*Dayton-Goose Creek Ry. vs. United States,* 263 U. S. 456, 486], in most cases a fair return has been held to be not less than 8 per cent. In all cases in this Court or in the lower federal courts, it is recognized that the question is a *judicial* question, to be decided on the law and the evidence, not controlled by the fiat of a commission. In this Court the decision on this question may be reviewed and reversed not only on appeal from a lower federal court [*Pacific Gas Co. vs. San Francisco,* 265 U. S. 403] but also on writ of error to a state court. [*Bluefield Co. vs. Public Service Commission,* 262 U. S. 679.] On writ of error to a state court, this Court will set aside findings of state courts and commissions contrary to the uncontradicted evidence or otherwise unsupported by evidence. [*Ohio Utilities Company vs. Public Utilities Commission of Ohio,* 267 U. S. 359.]

The Commission.

The Commission—and the Court of Appeals—justify a return limited to 6.26 per cent. on grounds directly contrary to the decisions of this Court and the constitutional principles established by this Court.

The Commission in its opinion of February 10, 1928, after finding that the annual return that can reasonably be expected from the rates fixed by its order amounts to 6.26 per cent., concluded:

> "If riding should fall off any further this rate of return [6.26 per cent.] would be further decreased.
>
> "The Commission believes that this rate of fare will be fair to the public and will yield a fair rate of return

to the Company, making due allowance for possible decrease in riding. This conclusion, in so far as the Company is concerned, is supported by the fact that few, if any, street railway companies are earning more than the rate of return which it is estimated will be produced by this fare.

"The Commission will therefore deny the Company's application for a ten-cent flat fare and will fix a rate of fare at eight and one-third cents on a token basis or nine cents cash." [R. 55-56.]

In reaching this conclusion the Commission, referring to cases above cited [*supra*, 32-46] in which utilities were held entitled, in order to escape confiscation, to earn a return of at least 8 per cent., said (italics ours):

"Company's counsel also state (Brief, page 88) that:

'In not one of those cases in which a utility was held entitled to earn a return of at least 8 per cent. were the risks of the utility business as great as they now are in the street railway business. If those utilities are entitled to a return of at least 8 per cent., this Company is entitled to more than 8 per cent.'

"This, in the Commission's opinion, by no means follows. It may be pointed out that in not a single case where a utility was held to be entitled to an 8 per cent. return, was that utility a street railway company. As far as this Commission knows, there is not one in the country that is earning as much as a 7 per cent. return on the present day value of its property. The Commission cannot ignore the significance of that situation. Street railway companies have no reason to be more modest in asserting their rights than gas and electric and water companies, which, on the facts in their particular cases, have been held entitled to a return of 8 per cent. There must have been some reason, other than modesty or regard for the public's purse or even contracts establishing rates of fare, that has kept them from appealing for their rights in court, if their properties were being confiscated by a return of less than 8 per cent., in fact, by a return of less than 6 per cent. Perhaps the consideration that has kept them out of

court has been the belief that they could not earn 8 per cent. at rates which the public would pay, and that the effort to get an 8 per cent. return, if allowed by the courts, would, through the operation of the law of diminishing returns, result in their earning even less than they are earning now."

"It is true, as counsel states, that in not one of those cases in which a utility was held entitled to earn a return of 8 per cent., were the risks of the utility business as great as they now are in the street railway business. And it is, we believe, because of those very risks that capital is reluctant to invest in street railways, and that no new street railways are being built in the United States today. Witnesses for the Company (Messrs. Hoyt, Burroughs and Fenhagen) testified than an 8 per cent. return would be necessary to get capital to invest in street railway properties, but none of them showed that any street railway company did or could earn that rate. As a matter of fact, none of them do. Therefore, according to the testimony, it is not possible to get capital, not only for the United Railways, but for any street railway in the country. Yet we do know that capital *is* forthcoming at fair rates of interest for well managed street railway companies which are giving adequate service to the public at reasonable rates, even if those rates do not yield 8 per cent. It may be true, however, that capital could not be obtained for the establishment of a complete, new railway system anywhere in this country.

"SHOULD RISK INCREASE RATE OF RETURN

"We do not agree with counsel for the Company in their theory, that, because of the risks, 'if those utilities are entitled to a return of at least 8 per cent., this Company is entitled to more than 8 per cent.' This Commission feels that the risk of the business, which is largely due to automobile competition, is in fact the element which limits the rate of return which the Company can earn, rather than justifies an increasing return, in the same manner that it limits riding.

"The risk which the railway industry now faces is the same risk that confronts any business or industry

when new methods of doing a familiar thing are developed. Regulation cannot protect regulated industries from that kind of risk. Sail was compelled to give way to steam on the seas. Even if sail had been protected by regulation it could not have been saved by increasing rates or by being granted a fixed return on the value of ships. Canals gave way to the steam railroads. Increased rates could not have saved them. The package freight business of the steam railroads is being taken by motor trucks, and the short distance passenger is being carried in increasing number by buses. The parcel post has taken the small package business from the express companies. The jobbing business in Baltimore is today giving way to direct dealing between manufacturer and retailer. The little electric railway which, in the middle eighties, ran from Huntington Avenue and Oak Street to Hampden and Woodberry, indicated the end of the horse cars and the substitution of the trolley car, not only in Baltimore but all over the United States.

"Now the street car is encountering the competition of the private automobile. That competition cannot be checked by any means now available. The street railway is still a necessary means of transportation and is the only means of handling passengers in large numbers at present available. But it certainly cannot follow that, because it is faced with a serious risk to its future, the risk itself entitles it to a greater return on the value of its property than are those utilities which have no such risk.

"So long as the Company is performing a necessary service it is entitled to be compensated for that service by an amount which will cover its costs, and will yield a fair profit on the use of its property. And this Commission will authorize the Company to collect a rate which will yield that cost and profit, so long as it is reasonable and no more than the Commission feels the service is worth to the public. But the Company cannot depend upon regulation and increasing rates to save it from ultimate disaster, if, because of the automobile, or any other new agency of transportation, its service becomes obsolete, and the use of that service is

> confined to comparatively few people. The Company has been protected from jitney competition and its rates have heretofore been raised to meet increasing costs of rendering service, but there is a limit beyond which the Commission cannot go in permitting higher rates to meet, not increasing costs of doing business, but failure to earn a sufficient return, due to the falling off of business." [R. 37-39.]

The Commission says "that capital *is* forthcoming at fair rates of interest for well managed street railway companies which are giving adequate service to the public at reasonable rates, even if those rates do not yield 8 per cent." The Commission does *not* say—for the facts and all the evidence are directly contrary [*supra*, 28-32]—that capital is forthcoming for street railway companies or any other utilities earning only 6.26 per cent. *on equal terms* with the capital already invested, or even that *borrowed* capital is forthcoming for investment in street railways at rates of interest such as to cost the companies not more than 6.26 per cent. When the cost of borrowed money, *i. e.*, new capital invested not on equal terms with the old but with priority over the old, exceeds or even equals the return permitted to be earned on the property as a whole, then part of the capital already invested is confiscated by the imposed necessity of giving the new capital both the priority in claim and also a larger return than the old—or even an equal return with it.

The Commission's conclusion and the grounds of its conclusion as to what constitutes a fair return for the Company are revolutionary. Street railway property is put in a class by itself, subject to all the risks of property embarked in strictly private business and all the restrictions of property used in public service without the constitutional protection afforded to either. This classification of street railways apart from all other utilities, as JUDGE ULMAN says, "is somewhat strange; even more strange is the Commission's suggestion that this regulated public industry should be

placed in a class with jobbers of merchandise." [R. 74.] No less strange is the Court of Appeals' comparison with the ice business:

> "It is a matter of general knowledge that the manufacture and sale of machines for artificial refrigeration, and the manufacture of ice in homes, has had a serious effect on the artificial and natural ice business as formerly conducted. But assuming that the ice business is a public utility and its rates subject to regulation, it would be manifestly unreasonable to allow an ice company to charge to its patrons the losses it had suffered from the inroads of competitors, by requiring them to pay rates high enough to absorb these losses." [R. 1643; 155 Md. 596-597; *infra*, 141.]

If the price of ice were now regulated by law and kept *down* to *cost*, (and readiness to serve were compulsory), then it would be manifestly unreasonable—and confiscatory —*not* to allow the price to be increased and kept *up* to *cost*, when through decrease in volume of business or otherwise cost is increased. Prices, like the price of ice, *not* regulated by law but by competition, are automatically kept *up*, as well as *down*, to cost.

The Commission and the Court of Appeals simply refuse to recognize the constitutional basis of all rate regulation—cost of service—when cost of service is *increased*. Commissions lawfully may, and universally do, *reduce* rates when cost of service is decreased through changed use of service or otherwise. When the tide turns and expense is increased, rates likewise must be increased. Commissions can not define "rate regulation" as a synonym for "rate reduction."

"Falling off of business" of the Company has occurred *not* because "its service is becoming obsolete" or "the use of that service is confined to comparatively few people." Its service has never been more necessary or used by more people. The "falling off of business" is due to the same

causes as increase in business of other utilities, viz., *changed uses* of service, made possible by the unparalleled prosperity, or extravagance, or both, of the American people. For precisely the same reasons, the public makes new and increased uses of electricity, new and increased uses of automobiles and consequently diminished use of street cars. Everybody, however, must use street cars; the more pleasure riding and other unnecessary riding diminish, the more necessary are the other uses and the more indispensable the street car to carry the *still growing* peak loads [*supra*, 11] that the automobile and the streets themselves could not otherwise accommodate at all. Rates for electricity *automatically* decrease as the customer makes a changed use which is less costly, and increase as he makes a more costly use. The public must likewise pay the cost of the *changed use* it makes of the Company's service. "Increasing costs of doing business" "due to the falling off of business," *i. e.*, to *changed use* of service, must be paid for like all other increased costs.

The novel conclusion that *risk limits*, instead of *increasing*, the amount that constitutes a *fair* return is, as JUDGE ULMAN says, "an inverted conclusion." [R. 75.] *Risk*, in a broad sense, is the economic measure of the difference between the returns expected (and necessary to attract capital) on different investments. The greater the risk the greater the expected (and necessary) return. In the first New York gas case (decided in January, 1909) the decision that a 6 per cent. return was non-confiscatory was based directly on **smallness of risk.** This Court said, "In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum," and remarked that "the court below regarded it as the most favorably situated gas business in America." [*Willcox vs. Consolidated Gas Company*, 212 U. S. 19, 49.]

The Commission confuses *legal* limitation of *rates* with *economic* limitation of *business.* The *only* limitation from which the Company asked relief of the Commission was limitation of *rates* by the Commission's own *fiat.* The Company did not ask the Commission for "protection" from automobile competition—or from any *risk* "which *limits the rate of return* which the Company can earn, *in the same manner that it limits riding.*" Riding is not limited by commission *fiat;* the return which the Company can earn is not limited by automobile competition. Nor is "increasing rates" *now limited by the Commission* a form of "protection" or "salvation" by "regulation"; it is only self-preservation by lifting a yoke imposed by "regulation" and by preventing "regulation" from crushing what it says it cannot "protect." During and after the war, while street railways and other utilities were suffering confiscation through *legal* limitation of *rates* and commission procrastination in approving increases, "sail," which was *not* "protected by regulation," earned enormous returns "on the seas" "by increasing rates" and by *not* being *limited* to "a fixed return on the value of ships." Though increased rates could not save canals, nobody suggested approaching "ultimate disaster" as an excuse for confiscating their property through *legal* rate limitation *before* the arrival of *economic* disaster. If every Baltimore jobber but one should become bankrupt, no commission could by rate limitation force the sole survivor to follow his fellows.

The Commission virtually asserts a *prescriptive right* on the part of the public *to confiscate the properties of all the street railway companies in the United States* for delay in "appealing for their rights in court." The street railway industry (the Commission says) is not like other utilities, which are *permitted* to earn and *do* earn 8 per cent. In the street railway industry this simply "isn't done." Street railway properties *actually* earn only 6 per cent. or less.

Ergo, this Company shall not be *permitted* to earn more than 6 per cent.

As to this assertion by the Commission, as JUDGE ULMAN tersely says, "it is sufficient to cite *Bluefield Company vs. Public Service Commission,* 262 U. S. 679, 694-695." [R. 76.] Instead of establishing a prescriptive right to confiscate the utility's property, the very fact that for a long time the utility's return has been small is a reason why the utility should not be prevented *by law* from earning a much larger return. The fact that the Bluefield Company for *twenty-five years* had earned *less* than *five* per cent. was one of the reasons why a rate which prevented it from earning *more* than *six* per cent. was held confiscatory.

> "Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it. In this case the record shows that the rate of return has been low through a long period up to the time of the inquiry by the commission here involved. For example, the average rate of return on the total cost of the property from 1895 to 1915, inclusive, was less than 5 per cent.; from 1911 to 1915, inclusive, about 4.4 per cent., without allowance for depreciation. In 1915 the net operating income was approximately $24,700, leaving $15,500, approximately, or 3.4 per cent. on $460,000 fixed by the commission, after deducting 2 per cent. for depreciation. In 1920, the net operating income was approximately $25,465, leaving $16,265 for return, after allowing for depreciation. Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent.

upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service."

Bluefield Co. vs. Pub. Serv. Comm., 262 U. S. 679, 694-695.

That a utility's *right* to a fair return may be lost by forbearance—or, if you will, delay—in asserting it, is the opposite of established doctrine. By enjoying inadequate rates too long the public cannot acquire a right to continue such rates still longer. On the contrary, under the decisions of this Court, the question is, not whether the utility has delayed too long before attacking a confiscatory rate but whether it has waited long enough to make it reasonably clear that the rate will actually prove to be confiscatory. [*Knoxville vs. Water Co.*, 212 U. S. 1; *Willcox vs. Consolidated Gas Co.*, 212 U. S. 19; *Penn. R. R. Co. vs. Public Service Commission*, 126 Md. 59, 79-81.] It is not for the public to complain that the Company did not assert its rights sooner.

The Commission would do violence to orderly procedure as well as to substantive rights. *To try one carfare case it would be necessary for a commission to try every possible carfare case in the United States.* There are difficulties enough in the comparison of *fares* in other cities. Without looking further than the Commission's opinion it is evident that the Company's peculiar burdens of (1) a city park tax of 9 per cent. on gross receipts [R. 28-29] and (2) unprofitable zone extensions to new city limits which include much rural territory [R. 22-23] would make a flat 10 cent fare in Baltimore small in comparison with the flat 10 cent fare that has been in force in Boston for years. In 1918 the Baltimore city limits, which formerly contained 32.19 square miles, were extended so as to contain 95.32 square miles, including 11.30 square miles of water. This trebling of area added only about 100,000 to the population, which (thus increased) was 733,826 in 1920. [Encyclopaedia Britan-

nica, Thirteenth Edition, Volume I, 322.] The Boston city limits contain only forty-eight square miles with a population of 748,060 in 1920, and are surrounded by a metropolitan area, much of it densely populated, which (including the city of Boston) contains 409½ square miles with a population of 1,658,936 in 1920 [Encyclopaedia Britannica, Thirteenth Edition, Volume I, 413]. This metropolitan area is *not* covered by a single 10 cent carfare.

What *rates* of *return* are actually earned in other cities, why the return in each case is not more or less than it actually is, why the utility does not ask or get higher rates—are questions which require the same inquiry *concerning each city* as has been made concerning Baltimore. Such an inquiry would lead into all the complex local conditions, including complexities of the legal status of the street railway company or companies in each locality. For instance, what the Commission says about alleged rates of return of other companies is based on a tabulation of wholesale hearsay [People's Counsel Exhibit No. 25, R. 1517], which is set out in the opinion of the Court of Appeals [R. 1635; 155 Md. 588; *infra,* 131] and which includes a return of 3.06 per cent. on $54,000,000 in Los Angeles; in a case now pending before this Court [No. 60] the statutory court for southern California [*Los Angeles Ry. Corporation vs. Railroad Commission,* 29 F. (2d) 140, 147] and the California Commission found a return of 4.9 per cent. on $42,000,000 and the California Commission found an average return of 6.6 per cent. for the last seven years [*Re Los Angeles Ry. Corporation,* P. U. R. 1928 D, 75, 80]. If, however, such hearsay were reliable, it would be irrelevant. This Company's constitutional rights are not lost by forbearance or delay in asserting them; *a fortiori* they would not be lost by delay of other street railway companies in asserting their rights.

As this Court judicially knows, the principal reason why street railway companies have not all asserted their constitutional rights is that many have none to assert. In

many cities rates have been irrevocably fixed by contract and can not be changed without the consent of the local contracting parties. [*Detroit vs. Detroit Citizens St. Ry. Co.*, 184 U. S. 368, 382; *Cleveland vs. Cleveland City Ry. Co.*, 194 U. S. 517, 536; *Minneapolis vs. Street Railway Co.*, 215 U. S. 417, 434; *Detroit United Ry. vs. Michigan*, 242 U. S. 238; *Detroit United Ry. vs. Detroit*, 248 U. S. 429, 437; *Columbus Ry. & Power Co. vs. Columbus*, 249 U. S. 399; *Georgia Ry. Co. vs. Decatur*, 262 U. S. 432, 439. Cf. *Gilchrist vs. Interborough Company*, 279 U. S. 159.] A sufficient reason why the Company did not assert its constitutional rights earlier is that in four previous rate cases it had sought *prompt*—and received meagre—relief (urgently needed) without a valuation of its property, and its valuation case was not decided until 1926 and (on one point) was reheard a few weeks before the instant case was instituted.

The Commission in its opinion, quoting this Court in the *Bluefield Company* case [*supra*, 33] said:

> "The Commission feels that the Company 'is entitled to such rates as will permit it to earn a return on the value of the property * * * equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.' The only comparable business undertakings 'attended by corresponding risks and uncertainties' that this Commission knows of are those of other street railway companies in the East, and it does not know of such a company which is earning a return of much, if any, more than 6 per cent., no matter what the rate of fare." [R. 36.]

The Commission's comparison confuses present investments with past investments already lost or confiscated. The return which must be permitted in order to avoid confiscation is measured by the return "generally being made *at the same time*" on new investments, not on past investments already wholly or partly lost or confiscated. In the

New York gas cases eight or more gas companies engaged at the same time, in the same immediate locality, in the same business undertaking, attended by the same risks and uncertainties, were suffering confiscation in the same way, earning substantially the same inadequate confiscatory return. [*Newton vs. Consolidated Gas Company,* 259 U. S. 101, 258 U. S. 165.] The Commission would say that the business undertakings most comparable to each company were the other seven, and as none of the eight were earning a fair return, none of the eight were entitled to a fair return or to any relief. When the New York gas cases were instituted gas companies were suffering confiscation about as generally as street railways now are.

The Court of Appeals, in developing the Commission's text that a fair rate of return "varies with the circumstances," ignores or misunderstands this Court's other decisions [*supra,* 32-39, 46] and elaborates *irrelevant* "circumstances" as justifying a return clearly confiscatory. Thus, at the outset of the discussion, "there is a third approach, in which the question [whether a return of 6.26 per cent. is confiscatory] is viewed from the standpoint of the State, in which case, factors which from the standpoint of the public or the corporation have varying weights, such as the nature and necessity of the service, the effect of its continuance or withdrawal, both upon the security holders of the corporation, and upon property values, and the welfare of the people in the territory served by it, the extent to which the State itself is a partner in the enterprise, and the circumstances and conditions under which the Company acquired and exercised its franchises and privileges may become of paramount and controlling importance, and in our judgment the question must be approached from that direction." [R. 1627; 155 Md. 580; *infra,* 122-123.] " * * * while there are cases which hold that such utilities are entitled to a return of six or seven or eight per cent. on the value of their properties, they have no controlling weight, because

the decisions are uniformly found to be based upon facts peculiar to the several cases. So in this particular case, in deciding whether the schedule of rates prescribed by the Commission is confiscatory, we must be guided by the facts of this case, and are little aided by what this court or some other court may upon different facts have found to be lawful or confiscatory, fair or unreasonable rates." [R. 1631; 155 Md. 584; *infra,* 127.]

Past confiscation and confiscation elsewhere are "circumstances" reiterated in various forms as justifying present confiscation. " * * * when the Company contends that since conditions, which neither it nor any one else can control, increase the expense of its service, that it should be permitted not only to transfer that entire burden to that part of the public who must of necessity use its lines, but to also increase its net earnings beyond a point they have ever reached, it ignores the very patent fact, that if the State withdrew from it the protection from competition by other public service companies offering the same service, which it now enjoys, its very existence would be threatened. The mere fact therefore that increasing automobile competition has made it more expensive for the Company to serve those who do use its lines, while it justifies increasing its rates to a point which will absorb the increased expense, affords no excuse for still further increasing them to a point which will not only be burdensome to the traveling public but will at the same time yield to the Company a greater return than it has ever received, and greater than that usually received by others operating in the same field elsewhere under substantially the same conditions." [R. 1642-1643; 155 Md. 595-596; *infra,* 140.] " * * * in determining whether the rates fixed by the Commission are confiscatory we are finally remitted to a few simple realities, such as the past earnings of the Company, the returns usually received by other companies engaged in the same business in other fields under somewhat similar conditions, the rates which

the Company has voluntarily fixed for its service in the past, the decrease in the purchasing power of the dollar, and the effect which other orders of the Commission have had upon the earning power of the Company." [R. 1644; 155 Md. 597; *infra,* 142.]

Some alleged "circumstances" are not only irrelevant but also contrary to the uncontradicted evidence and indeed mutually contradictory. On the uncontradicted evidence that the Company's cost of *borrowed* money has averaged 7.23 per cent. and this experience is quite in line with the general situation of street railways [*supra,* 30], the Company's position that not less than 8 per cent. is a fair return is inaccurately referred to as a "contention • • • that an eight per cent. return is necessary to enable the Company to borrow money at reasonable rates, and that the fact that it is limited to a rate schedule which will yield a return of only 6.26 per cent. puts it at a disadvantage as a borrower and weakens its credit." [R. 1640; 155 Md. 593; *infra,* 138.] The Court of Appeals says "the evidence fails to support that contention," and characterizes the wholly uncontradicted testimony (inaccurately called "testimony pro and con") [*supra,* 28-32], *not* questioned by the Commission, as "subjective," "highly conjectural," "speculative" and "interested," though of "conceded usefulness" [R. 1640-1641; 155 Md. 593-594; *infra,* 138], *because* (1) "it is quite as reasonable to assume that the fact that the ratio of the Company's funded debt to the value of its property is, as the Commission found, approximately 90%, affects its credit, as the fact that it can only earn 6.26[%] on the value of its property" and (2) "the market price of its securities indicates continued public confidence in its stability, as well as in its ability to liquidate its obligations, when and as they accrue" [R. 1641; 155 Md. 594; *infra,* 139]. In short, (1) credit is affected by ratio of funded debt to property and (2) credit is *not* affected at

all. These contradictory reasons are *both* unsupported by evidence.

The Company's cost of borrowed money is *not* due to ratio of funded debt to value of property. "Funded debt" includes approximately $14,000,000 of income bonds [R. 1632; 155 Md. 585; *infra,* 128] (without fixed maturity) junior in obligation and lien to its other mortgage bonds and junior in *obligation* to unsecured notes—financially equivalent to and actually substituted for former preferred stock. The mortgage bonds [R. 1632; 155 Md. 585; *infra,* 128] are only 63.2 per cent. of $75,000,000, the value of the property. Prices of the *senior* mortgage bonds [R. 1638; 155 Md. 591; *infra,* 135] are not affected by whether *junior* securities are income bonds or preferred stock. Relative prices of the mortgage bonds and unsecured notes [R. 1638; 155 Md. 591; *infra,* 135] show the same is true of unsecured notes.

VALUE OF SERVICE TO THE CUSTOMER.

On August 1, 1927, when the instant case was instituted by the Company's application to the Commission for increased fares, facts already established beyond dispute in the four previous rate cases and the valuation case had demonstrated that the Company's rates were, and for some years had been, confiscatory. Before the Commission People's Counsel [Public Service Commission Law, section 6. 353; *infra,* 106] and other opponents of the Company, unable to dispute the facts that constitute confiscation, resorted, not from choice but by elimination, to the contention that rates cannot exceed what the service is worth to the customer, even though they may fail to yield a fair return. The Company fully met this contention (as far as so vague a contention can be met) on the facts as well as the law. The Commission's opinion shows the absence of facts or evidence to make the contention applicable to the instant case. Nevertheless in the state courts People's Counsel, as counsel *for* the Commission, renewed

contentions, as to the facts, already rejected *by* the Commission. JUDGE ULMAN in the Circuit Court and CHIEF JUDGE BOND and JUDGE PARKE in the Court of Appeals expressly hold the contention as to value of service unsupported by evidence and contrary to the facts. The majority opinion of the Court of Appeals also finds it unsupported by evidence; but draws the extraordinary conclusion, not that the contention therefore fails, but that the matter "can only rest in the judgment of the Commission." Thus proved confiscation can be justified by a contention which, without supporting evidence, "can only rest in the judgment of the Commission."

The Law.

May rates ever be limited to less than a fair return, when higher rates would *not* be unproductive? This question, of academic interest, is presented but need *not* be decided in the instant case. A writer cited in MR. JUSTICE BRANDEIS' dissenting opinion in *Southwestern Bell Telephone Co. vs. Public Service Commission,* 262 U. S. 276, 301, discusses the question on principle, reviews the authorities at length and answers in the negative. [Henry W. Edgerton, "Value of the Service as a Factor in Rate Making," 32 Harvard Law Review 516, 520-534.]

MR. JUSTICE BRANDEIS in the same dissenting opinion says:

> " • • • the Federal Constitution guarantees to the utility the opportunity to earn a fair return."[2]
>
> *S. W. Tel. Co. vs. Public Service Commission,* 262 U. S. 276, 290.

In *Smyth vs. Ames,* 169 U. S. 466, 547, this Court said:

"[2] Except that rates may, in no event, be prohibitive, exorbitant, or unduly burdensome to the public. *Covington & Lexington Turnpike Road Co. vs. Sandford,* 164 U. S. 578, 596; *Smyth vs. Ames,* 169 U. S. 466, 544; *San Diego Land & Town Co. vs. National City,* 174 U. S. 739, 757; *Minnesota Rate Cases,* 230 U. S. 352, 454; MR. JUSTICE MILLER in *Chicago, Milwaukee & St. Paul Ry. Co. vs. Minnesota,* 134 U. S. 418, 459."

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Do these two statements in *Smyth vs. Ames* conflict and does the second override the first? In MR. JUSTICE BRANDEIS' footnote are "exorbitant" and "unduly burdensome" broader than "prohibitive" in the sense of "unproductive?" In *New England Divisions Case,* 261 U. S. 184, 191-192, this Court, by MR. JUSTICE BRANDEIS, evidently used the expression "unduly burdensome" as substantially equivalent to "prohibitive" in that sense.

Assuming, however, (for sake of argument only), that the above questions may *all* be answered in the affirmative, the scope of the doctrine invoked is at most exceedingly limited. How *exceptional* must be the circumstances under which a rate (*not* unproductive) may exceed "the value of the service to the customer" without yielding more than a fair return, is indicated (1) by the substance and *form* of MR. JUSTICE BRANDEIS' *footnote* and (2) by the *fact* that *no such exceptional case has ever been decided as such by this Court* (or apparently any other court). None of the five cases cited in MR. JUSTICE BRANDEIS' footnote was such a case; in *Covington, etc., Turnpike Co. vs. Sandford,* 164 U. S. 578, quoted by the Court of Appeals, the rates in question were actually held unconstitutional—though there was no valuation of property. In *Darnell vs. Edwards,* 244 U. S. 564, 570, (cited by counsel in the instant case), the decision was based on failure of proof of confiscation.

Service worth having is normally worth *at least* what it costs, including a fair return. Exceptions (if any) must be *proved.*

"If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of

> rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear."

Northern Pacific Ry. vs. North Dakota, 236 U. S. 585, 599.

> " * * * if in any case it could be said that there existed other criteria by reference to which the rate could still be supported as a reasonable one for the transportation in question, it would be necessary to cause this to appear."

Norfolk & Western Ry. vs. West Virginia, 236 U. S. 605, 609.

Assuming also, for sake of argument, that courts of equity will not help a utility erect a "spite fence" of rates that clearly will not benefit the utility [*Donham vs. Public Service Commission,* 232 Mass. 309, P. U. R. 1919 C, 880, 890, 893], again the *fact* that a rate would be unproductive must be clearly *proved.* The question is ordinarily one of management. A commission's duty is to protect the public by preventing a utility from charging more than is reasonable, not to protect the utility by preventing it from charging more than it can collect. In the *Donham* case there was some *apparently* substantial evidence, including shrinkage of fruits of previous fare increases from $2,791,000 anticipated to $1,099,783 actual, to support the Commission in *tentatively* disapproving, *for two or four months,* part of a proposed further increase as likely to prove unproductive. The event, however, failed to justify the Commission's tentative order; fares were further increased, some to ten cents flat. [In Everett, Malden and Woburn. R. 684, 1122.] The *Donham* case, limited in scope as it is, apparently stands alone in sustaining even a *tentative* confiscatory rate.

The Court of Appeals so expands MR. JUSTICE BRANDEIS' footnote that the exception becomes the rule. The constitutional guaranty of "the opportunity to earn a fair return" evaporates into an exception, "in *extreme* cases," to

a new doctrine which is so "indefinite and vague" as to be practically not susceptible of proof and which, without supporting evidence, "can only rest in the judgment of the Commission." This new doctrine, therefore, is susceptible of universal application "except in extreme cases." In respect to the question whether rates limiting the Company to a return of 6.26 per cent are confiscatory, (the Court of Appeals says), the Commission's contention is that, whether the Commission rates are fair to the Company or not, "no higher rate should be allowed because the Company is only entitled to collect from the public the value of the service it renders. * * * Manifestly the proposition * * * of the Commission is too indefinite and vague to be of much aid in settling the question before us." [R. 1639, 1630; 155 Md. 591, 592, 583; *infra,* 136.] "Another factor suggested is that a decrease in the volume of traffic indicates that the rates are burdensome, and there is some force in that suggestion, * * *." [R. 1643-1644; 155 Md. 597; *infra,* 141.] By this test all rates are burdensome since they unquestionably decrease the number of passengers who would be willing to ride free. "Whether a given rate is burdensome to the public, involves the question of the value of the service, and presents an extremely difficult and troublesome question, the answer to which, *except in extreme cases,* can only rest in the judgment of the Commission operating upon varying factors each of which is entitled to some weight, but no one of which ordinarily is controlling." (Italics ours.) [R. 1643; 155 Md. 596; *infra,* 140.]

The Facts.

Before the Commission the Company's opponents rested this unsubstantial legal structure on assertions of fact, presented in various forms but in substance reducible to two—or two phases of the same assertion—(1) that a ten-cent fare would not increase revenue but would so decrease riding as to offset the increase in fare and any saving in

expense through decreased business, and (2) that ten cents is more than a ride is worth. In the state courts counsel enriched the vocabulary of the case by adding (3) that street railway service is not necessary to the people of Baltimore but is *moribund.* This third assertion is denied in terms by JUDGE ULMAN [R. 74-75] and by JUDGE PARKE and CHIEF JUDGE BOND [R. 1657; 155 Md. 610; *infra,* 158], and in substance by the majority opinion of the Court of Appeals. [R. 1641; 155 Md. 594.] All three assertions are not only unsupported by evidence but contrary to the Commission's findings.

The fact that for years *billions* of flat ten-cent car fares actually have been and are being paid in Boston and twenty-nine cities smaller than Baltimore [R. 680-681, 1121] is conclusive evidence that ten cents is *not* more than a ride is worth. The Record abounds in other uncontradicted evidence to the same effect—including the testimony of Dr. Jacob H. Hollander, Professor of Economics at Johns Hopkins University, which JUDGE ULMAN regards as "most persuasive." [R. 79, 82.] The fact is, *a ten-cent fare will now give the Company's customer more for his money than the pre-war five-cent fare gave him.*

The five-cent fare was not new in 1913; on the contrary, even then increasing prices, wages and expenses and enlarged service had made it *unreasonably low.* [*O'Brien vs. Board of Public Utility Commissioners,* 92 N. J. L. 44, P. U. R. 1919 B, 865, 870.] The five-cent fare was older than this Company; it had its origin in an early day of low expenses, due to low prices and still lower wages and standards of living. Thirty years ago prices were about one-third less than in 1913. [R. 1170.] Practically all customers then were "short riders." Five cents was the fare for a single "short ride" without a transfer. Formation of the Company by consolidation in 1899 made free transfers universal. The five-cent fare with free transfers was

immediately adopted by the legislature. [Acts of 1900, Chapter 313; *infra*, 112.]

During these thirty years, not only prices generally, but especially wages, have greatly increased. This increase in wages is an increase on the one hand in the Company's expenses and on the other hand in the customer's ability to pay. Since 1913, the Company's wages and operating expenses [Company's Exhibit No. 29, R. 1460], and also wages generally and consequently the purchasing capacity of its customers, have more than doubled. [See testimony of Dr. Hollander, R. 1162, 1177, 1193-1194.] The growth of population and the movement to the suburbs has steadily increased the number and proportion of passengers who are "long riders"; extension of all zones to the new city limits has greatly increased the distance "long riders" are carried for a single fare.

"Value of service to the customer," as well as cost to the Company, has been greatly increased by *changed use* of the service. Formerly the *exclusive* means of transportation for practically *all*, the street car is still a *necessary* and *vital* service for *all*, though *exclusive* for almost *none*. The Company's peak burden continues to increase [*supra*, 11] but its gross volume of business decreases. The number of passengers increases but the number of rides decreases. This is due to the *choice* and ability of the *public* to substitute the more expensive automobile for pleasure and use the street car for necessity. This makes the Company's service more costly to the Company but even *more necessary* to the customer, though still far less expensive than the automobile.

The *value* to the *customer* of this more costly street car service and the customer's *capacity* to *pay* for it are alike demonstrated by the very *demand* for *automobiles* which has made this service necessary and by the capacity to pay which has made this demand possible. The universality of

the automobile is striking evidence of American capacity to pay—whether comparison be made with pre-war America or post-war Europe. On January 1, 1926, there was one motor vehicle to every 5.7 persons in the United States. [Encyclopaedia Britannica, 13th Edition, Volume II, 972.] In 1924 there were 17,726,507 motor vehicles in the United States; in 1912, 1,007,882. At the end of 1924 there were 17,878,000, of which 15,597,000 were passenger cars; in Great Britain, there were 625,000 passenger cars. [*Ibid.*, 973.] In proportion to population there were thus more than *ten times* as many passenger cars in the United States as in Great Britain, though more in Great Britain than in any European country. In 1909 there were in proportion to population apparently about as many in Great Britain as in the United States. [Encyclopaedia Britannica, 11th Edition, Volume XVIII, 919, 920.] In Maryland the number of automobiles has increased from 203,040 in 1924 to 280,000 in 1927. [Company's Exhibit No. 11, R. 1406.] In 1926 the people of Baltimore and vicinity paid *more* for *gasoline* alone than for carfares. [Company's Exhibit No. 21, R. 1421-1423.]

In short, the greater part of the entire population (considered as families, not as individuals) *owns* automobiles; to a greater or less extent *everybody uses* them. A suggestion that the people of Baltimore cannot, or will not, pay ten cents for a necessary and vital service that the automobile cannot furnish at all and could not in any event furnish as cheaply, is preposterous.

Recent statements by Mr. Justice Brandeis concerning water rates, (in contrasting local utility rates with steam railroad freight rates), are also applicable to street car fares: "Rail rates are sometimes held illegal because the exaction is greater than the value of the service to the shipper. There is in fact no corresponding limitation upon water rates. The charge is so small, as compared with the

inconvenience which would be suffered in doing without the service, that the worth to the water taker could rarely be doubted." [*St. L. & O'Fallon R. Co. vs. U. S.*, 279 U. S. 461, 536-537.]

On the subject of "value of service to the customer" the facts, as found by the Commission, are stated in its opinion as follows:

> "The Commission believes that today the falling off in riding is due, not to the amount of the fare, but in part to the slump in business which has been felt in all parts of the country and which continues, and in still larger part to the more general use of the automobile. Automobile competition promises to be greater in 1928 than it was in 1927. The country is now witnessing the most active automobile-selling campaign that the industry has ever known. If it be true, as counsel for the Company state (Brief, page 6), that the people of Baltimore paid more for gasoline in 1926 than they paid for carfares, they will probably continue to pay more in 1928.
>
> "RAILWAY SERVICE A NECESSITY.
>
> "That the service rendered by the Company is a necessary and vital service to the people of Baltimore, is indicated by the fact that the demand upon the system during morning and evening rush hours is almost greater than the Company can meet. Time was when the service was used for pleasure. That day has gone. The motor car has largely taken the place of the street car for pleasure riding. The street cars are used only by those who find them necessary or convenient to get to and from places of employment, or for other trips about the city. The service to the people for such trips is almost indispensable. It would be practically impossible for all the people who use the street cars to reach their places of business or employment, and return to their homes, by any other means of transportation now available. And if the service is necessary to them they cannot expect to be transported for less than the cost of transporting them, plus a fair return for the use of

the agency of transportation. Even at somewhat increased cost it still would be the *cheapest* form of transportation the people could get.

"That the extension of the railway system into the suburbs has resulted in the development of the sections which the lines serve is beyond question. Even in these days of almost universal use of the automobile, property values, except perhaps in that part of the City as it existed prior to the annexation of 1888, are dependent largely upon street railway transportation. Withdrawal or material curtailment of service would be felt immediately in the lowering of real estate values, for there is no transportation agency which could give so comprehensive a service at such low cost.

"Moreover, the development of property and the creation of higher values along the outlying lines of the Company often have been largely at the *expense* of the Company. While creating increased values in land by the extension of its lines and service, thus benefiting immediately the property owner (and the City and County by increasing the taxable basis), the Company has no way of sharing in the increased values it creates until the time comes when there is sufficient development in new territory to produce enough traffic to make the operation of the lines compensatory. Until that time is reached, the Company is compelled to give service to new territory at a loss. This is not the case with gas, electric or telephone companies, for as lines of such companies are extended into new or sparsely settled sections, those receiving and benefiting by their service are required to pay part of the cost of building the extensions, being reimbursed as new customers come on the lines. Many of the Company's lines which extend into the suburbs are still operated at a loss.

"Much has been said about the loss of the short rider and this is often attributed to the price of the car ride. This may be true in some cases, but it does not appear to be so with a great many. To the extent that the short rider has been lost, this loss is due, it seems to the Commission, not so much to the cost of the ride but to the length of the time the ride itself takes. This is due to

the congestion in the streets, caused by the automobile which not only cuts into the revenues of the Company but slows up the operation of the street cars, so that an ordinarily vigorous person frequently can walk through the congested business section in less time than he can make the journey on a street car. With automobiles parked on each side of a street all traffic is forced on the car tracks, slowing up the cars and making street car operation more costly, for the slower the cars run, the more expensive it is to operate them.

"One reason for the Company's plight today is the fact that following annexation in 1918, the city zones on the street car system were extended to the new city line, this line for nearly the entire distance around the City having been extended about two miles. Annexation, while a desirable thing for the City, did not benefit the Railways Company in the slightest degree. Indeed, it imposed additional obligations upon it, and when extensions of fare zones were made it caused extensive loss of revenue which had to be made up through rate increases. In fact, taking all things into consideration, including the cost of giving the service, the extension of lines and fare zones, the greater transfer privileges, the auxiliary bus lines and the like, the Commission believes that street car riders as a whole today receive relatively much more for the fare they pay than they ever received for a five-cent fare." [R. 21-23.]

The Commission also found (and acted on the finding) that "an increase in fares does not result in any marked decrease in riding." [R. 31.]

The Court of Appeals says, " • • • there is little likelihood that it [the Company] will cease to be a highly productive property not only useful but essential to the city's welfare and the public convenience, • • • ." [R. 1641; 155 Md. 594; *infra*, 139.]

CHIEF JUDGE BOND in his dissenting opinion says:

"Another and different situation would be presented if it could be found as a fact that this sort of service

> cannot get the fair return because the service would not be worth so much to users; but I do not see the foundation for that finding in this case. The evidence given on the point goes only so far as to predict that a fare of ten cents would keep away two per cent. of the present users. And, beyond that testimony, if the full fair return requires a fare of so much, ten cents, comparison of that amount with prices generally paid for other services, bus fares, for instance, or fares of steam or interurban electric railways for similar mileage, or prices paid for cheap commodities and entertainments, seems to me to render it impossible to say that it is more than street railway transportation for an average of some miles is worth to riders." [R. 1655; 155 Md. 613; *infra,* 155.]

The majority opinion of the Court of Appeals, though it draws an extraordinary conclusion from the absence of evidence, nevertheless does make clear the absence of evidence that ten cents is more than a ride is worth. Indeed the very fact that such a contention is *not* supported by evidence and apparently is *not* susceptible of proof is made the basis for the strange conclusion that such a contention, without proof, "can only rest in the judgment of the Commission." "Manifestly the proposition [that ten cents is more than a ride is worth] * * * is too indefinite and vague to be of much aid in settling the question before us [whether rates limiting the Company to a return of 6.26 per cent. are confiscatory]. [R. 1639; 155 Md. 592; *infra,* 136.] "Nor is there any rule by which we may precisely determine what is the actual value to the public of such service as that which the Company sells." [R. 1640; 155 Md. 593; *infra,* 137.] "Another factor suggested is that a decrease in the volume of traffic indicates that the rates are burdensome, and there is some force in that suggestion, but the difficulty in this case lies in attributing the decline to the increase of fares. So far as the facts go, it may be due either to that or to the increasing use of the automobile. Whether it is due to one

or the other is a matter of unguided conjecture." [R. 1643-1644; 155 Md. 597; *infra,* 141.]

The Court of Appeals actually shows that a ten-cent fare would give the Company's customers no less for their money than the pre-war five-cent fare gave them:

> "It may be assumed that the base fare prior to the formation of the Commission was reasonable because up to that time no complaint had been made of it by the Company and in 1900 it was fixed by an act of the Legislature, which has never been challenged. The fare then was five cents, which would be approximately equal to 8⅓ cents today, when the decreased purchasing value of the dollar is considered, and if that were all the question would be free from difficulty, for if 5 cents was fair then the equivalent of the value which five cents had then should be fair now. But there are other factors which affect it, such as the extension of the city fare zone so as to embrace all the new territory brought into the city by the annexation of 1918, the effect of which was to relieve a part of the public of the burden of an extra fare, possibly at the expense of the Company and certainly of the remaining part of the public, and also the fact that certain of the operating expenses of the company such as the cost of labor increased in a ratio greater than that in which the purchasing power of the dollar declined, for although speaking generally the dollar now will purchase perhaps sixty per cent. of what it would in 1913 it will not purchase as much as fifty per cent. of the labor which the Company could have bought with it then." [R. 1644-1645; 155 Md. 597-598; *infra,* 142-143.]

The Court, however, immediately after stating these conclusions, repudiates them thus:

> "But these factors were considered fully by the Commission when it fixed the base fare at 7½ cents in 1924, and in view of that finding and of the further fact that the record does not disclose any data sufficiently specific to enable us to say that it was unlawful, we are not inclined to give them any controlling weight now, * * *." [R. 1645; 155 Md. 598; *infra,* 143.]

These are indeed remarkable reasons. "The record does not disclose any data sufficiently specific to enable us to say that" in 1924 the 7½ cent fare was "unlawful"—*except* clear uncontradicted evidence that it was confiscatory [*supra,* 31,]; in 1924 there was no direct evidence of confiscation before the Commission and no issue as to confiscation, for the simple reason that there had been no valuation of the Company's property. [R. 248, 266, 276.] True, the Commission did consider the factors above mentioned in the opinion of the Court of Appeals, but instead of holding that the public, on account of "value of service" or for any other reason, is entitled to service for less than cost, expressly held the contrary. In the 1924 rate case the Commission said:

> "Of one thing the public must be convinced. It must make up its mind to pay the cost of the service it receives. There is no magic in the operation of a street car system or any other utility that enables it to dodge the economic laws that affect the individual. When the Company has to pay twice as much for labor, and almost twice as much for everything else it uses, in producing a street car ride, it cannot sell its product at the price prevailing before its costs increased, any more than the individual can sell his labor at the prices prevailing before the startling increases in the cost of living, brought on by the war. The fact that the increase in cost to the user of street car transportation in Baltimore thus far has been only 40 per cent., while the operating costs of the railway company have increased from $4,102,766 in 1915 to $9,799,312 in 1923, or more than double, and taxes have increased from $904,675 to $1,800,335, while costs in substantially all non-regulated commodities and service have increased from at least 50 per cent. to 200 per cent., should indicate to the public the value it receives from the regulation of utilities.
>
> • • •
>
> "It is not to be expected that the average citizen can acquaint himself with all the complexities involved in determining a just rate of fare, and he is not to be

blamed when he forms his opinion from the statements of those who are supposed to know the truth, and whose business it is to find out the truth. But there is no excuse for those who know, or who, with reasonable diligence, can learn the exact truth of the situation when they attempt to mislead the public into believing it can get its street car rides for less than cost of production."

[R. 251, 252; 15 P. S. C. Maryland 104.]

JUDGE ADKINS in his concurring opinion in the Court of Appeals, (filed shortly after the opinion of the Court), stating "what [he understands] to be the meaning of JUDGE OFFUTT and of the Court," says:

"It was not intended, as I understand, to suggest that there is anything in the record to indicate that a ten-cent fare would be more than the service is worth if such a fare should be found necessary to pay for the cost of the service and to give the company a fair return on the value of its property." [R. 1654; 155 Md. 608; *infra*, 153.]

II.

THE COMPANY'S ANNUAL DEPRECIATION ALLOWANCE IS PROPERLY BASED ON PRESENT VALUE, NOT ON COST, OF ITS DEPRECIABLE PROPERTY.

The Court of Appeals unanimously [R. 1647-1650; 155 Md. 600-603; *infra*, 146-149], and JUDGE ULMAN also [R. 68-69], so hold; the Commission in its supplemental opinion [R. 1694] and order of November 28, 1928, so acted. On the original bill and on the first appeal to the Court of Appeals subordinate questions of law and fact relating to depreciation were also presented and are discussed in the opinions of JUDGE ULMAN and the Court of Appeals; after the Commission's supplemental opinion and order of November 28, 1928, these subordinate questions did not arise on the supplemental bill or on the second appeal to the Court of Appeals. The only question now presented is the question of law, whether

annual depreciation allowance should be based on present value or on cost. [*Supra,* 11-12.] On this question the Court of Appeals in effect holds that to base depreciation allowance on cost, instead of present value, is not only contrary to the Constitution of the United States, and therefore contrary to the similar provisions of the Maryland Constitution, but also unreasonable, *i. e.,* contrary to the state statute [Public Service Commission Law, section 43. 404, *infra,* 109.]

On the question now presented the Court of Appeals says:

"DEPRECIATION.

"Assuming that a schedule of fares which will yield to the Company a return of 6.26% on the value of its property is neither confiscatory nor unreasonable as a matter of law, the next question is whether the schedule adopted by the Commission in this case will in fact yield such a return. The answer to that question necessarily involves the allowance made for the depreciation of the Company's property used in the service to which it is dedicated. It is an elementary principle not only of constitutional law, but of common right, that such a Company must be permitted to earn such an income as will not only yield a fair return on the fair value of its property, but which will be sufficient to enable it to keep its property at a constant level of efficiency, so that it will be adequate for the public needs, and so that the value upon which the return is based will not be lessened. Anything more than that would be unjust to the public, anything less than that would be unjust both to the public and to the Company. For the public should not be required to pay rates based upon the present value of the property if that value is to be permitted to steadily depreciate, nor, should the Company's property be consumed in the public service without adequate provision for restoring it to the equivalent of its value. So that the Company is entitled to such an allowance as will not only adequately provide for current repairs, but for depreciation due to necessary re-

tirements, obsolescence, and the diminishing utility of property which cannot be arrested by repairs. So much is self-evident, is conceded by the parties to this appeal, and does not appear to be questioned anywhere. *Knoxville, etc., vs. Water Company,* 212 U. S. 1, Rose's Notes.

"The allowance made for current repairs under the head of maintenance does not appear to be questioned, so that the only inquiry is whether the allowance for depreciation is adequate. The Commission in fixing the fare schedule allowed * * * for depreciation, * * * $883,544 in 1928 * * * and its opinion indicates that in reaching that conclusion it considered the cost and not the present value of the Company's depreciable property. Unquestionably there is authority for that method of calculating a proper depreciation reserve, but in our opinion it is artificial, illogical and unsound, and ought not to be approved, and since we cannot say that proper methods would not have produced a result which would have affected the rate schedule adopted, the case should be remanded to the Commission in order that it may consider and determine the proper allowance for depreciation in accordance with rules hereinafter stated, and if necessary re-adjust the rate schedule to cover any changes it may make in that allowance.

"* * * if the conclusion actually reached was proper, the fact that it was reached by improper methods, would not justify us in disturbing it, so that the more important question is whether the base of the calculations by which it was tested was itself lawful. And that depends upon whether the Commission should have based its allowance for depreciation upon the original cost of the property, or upon its present value. It actually did use cost and not present value as the basis of its conclusion, and here again it must be said that there is authority for its procedure. But in our opinion it is justified by neither law nor right reason.

"In valuing the property for rate making purposes the Commission based its conclusion upon its present value and not upon its original cost, and in fact the case of *Havre de Grace Bridge Co. vs. P. S. C. supra,* left it no alternative. But if it was essential to adopt

that method for ascertaining the value of the property to which the rates were applied, it is not easy to see why it should not be adopted in estimating the amount needed to replace that property when it is worn out or becomes obsolete and worthless. If the Company paid $100,000 for property now only worth $10,000, it would be grossly unfair to the public to base its annual depreciation on its cost, and if on the other hand the Company paid $10,000 for property now worth $100,000, it would be equally unfair to it to compel it to sell that property to the public at 10% of its real value. These conclusions seem to be self-evident, and while there is authority to the contrary, they are supported by the reasoning in such cases as the *Havre de Grace Bridge Co. vs. Public Service Com.* supra, *Knoxville vs. Water Co.*, supra, and *Mich. Pub. Util. Com. vs. Mich. St. Tel. Co.*, 228 Mich. 658, and from the standpoint of fair play both to the Company and the public are inevitable. To require the Company to sell its service at rates which made no provision at all for the replacement or repair of the property when worn out or obsolete, would be plain confiscation, and to require it to sell it at rates which make an inadequate provision for the return of its value when worn out or obsolete as a result of public service can be no less.

"Counsel for the Commission suggest that to restore value would be to 'require the financing of additions to plant, to the extent of the excess of replacement over original cost of property replaced, by the public, which would in turn have to pay a return on the capital thus required.' The meaning of that suggestion is not altogether clear, but if it is that the Company is entitled to the return of anything less than the value of its property it cannot be sustained. Money deducted from earnings to replace equipment which has become worn out or obsolete, by other equipment of the same character and the same value, adds nothing to Company's resources but merely keeps them at the same level."

[R. 1647-1648, 1649-1650; 155 Md. 600-603; *infra*, 146-149.]

Property rights of a public utility include the right to

earn (1) a return [of 100 per cent.] *of* the property [*i. e.*, the *value* of the property] used and *consumed* [physically or economically] in the public service and (2) a return [of say 8 per cent.] *on* the property [*i. e.*, the *value* of the property] used and *not* yet *consumed*. The two rights—to a return *of* property, and a return *on* property—pertain to the same property and are essentially one and the same right. In point of time and urgency the right to a return *of* property is anterior to the right to a return *on* property; the former once violated, the property is gone; the latter may be temporarily invaded and later restored.

> "Before coming to the question of profit at all the Company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The Company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the *value* of the *property invested* is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the Company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation at least, its plain duty to the public." (Italics ours.)
>
> *Knoxville vs. Water Co.*, 212 U. S. 1, 13-14.

As the italicized words in the same sentence show, "investment" refers to "*property invested*," not to the *money* originally *invested* in the property. That is to say, "investment" is used in the sense of "that in which money is laid out or invested" [Century Dictionary] and not (as in the term "prudent investment") in the very recent special sense of *cost* as distinguished from *value*. At the moment when MR. JUSTICE BRANDEIS' dissenting opinion [*Southwestern Bell Telephone Co. vs. Public Service Commission*, 262 U. S. 276] had brought the term "prudent investment"

into vogue this Court again used "investment" in the old sense, viz., "a fair and reasonable return on the capital investment—the value of the property." [*Bluefield Co. vs. Public Service Commission,* 262 U. S. 679, 694.]

> "The property is held in private ownership and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law."
>
> *Minnesota Rate Cases,* 230 U. S. 352, 454.

In the *Knoxville* case the facts, and the utility's *duty* to the public, concerned *replacements,* made or neglected. The *right* of the utility is not limited to *replacements* but is the same as to all *retirements,* whether accompanied by replacements or not. The utility is entitled to a return of *all* property *retired,* whether replaced or not, through periodic allowances out of earnings to provide *in advance* for the retirements — certain to occur at an uncertain time. Whether a street car by accident or a gas main by explosion is destroyed and is replaced, or the fenders on street cars or a main to an exhausted gas well is retired and is *not* replaced, in either event the utility has *lost* property consumed (physically or economically) in the public service and is entitled to a *return* of such *property, i. e.,* its *value.* Failure to provide out of earnings for retirements does not relieve the utility of the *duty* to make replacements. Conversely, absence of need or duty to replace does not deprive the utility of the *right* to provide for retirements. "A depreciation charge resembles a life insurance premium." [Mr. Justice Brandeis, dissenting opinion in *Pacific Gas Co. vs. San Francisco,* 265 U. S. 403, 423.] It provides for return of the value of the *lost* property, whether that is or is not—or, like human life, cannot be—replaced.

However annual depreciation allowance is computed—whether directly as a percentage of property or indirectly

by reference to gross earnings or otherwise—unless it fairly provides for *return of property, i. e., value,* the utility's constitutional rights are invaded. *The law knows but one "rate base,"*—not one for return *of* property and another for return *on* property. Unless rates are sufficient to yield *both* returns, property is confiscated.

In *Southwestern Bell Telephone Co. vs. Public Service Commission,* 262 U. S. 276, this Court reaffirmed the rule of *Smyth vs. Ames,* 169 U. S. 466, that a utility is entitled to a fair return on the fair *value—not cost*—of its property. In applying this rule the Court computed the return on the value of the property by (*a*) reducing to a percentage of *value* the earnings available for *both* (1) depreciation allowance *and* (2) return *on* value and then (*b*) deducting from this percentage a separate percentage as the proper depreciation allowance. The Commission had used *cost* as the rate base for computing both (1) depreciation allowance and (2) return on property. This Court, holding this rate base improper for *either purpose,* used present *value* as the proper rate base for *both* purposes. In its opinion the Court said:

> "Witnesses for the Company asserted—and there was no substantial evidence to the contrary—that excluding cost of establishing the business the property was worth at least 25% more than the Commission's estimates, and we think the proof shows that for the purposes of the present case the valuation should be at least $25,000,000.
>
> "After disallowing an actual expenditure of $174,048.60 for rentals and services by the American Telephone & Telegraph Company and some other items not presently important, the Commission estimated the annual net profits on operations available for depreciation and return as $2,828,617.60—approximately 11⅓% of $25,000,000. That 6% should be allowed for depreciation appears to be accepted by the Commission. Deducting this would leave a possible 5⅓% return upon the minimum value of the property, which is wholly

inadequate considering the character of the investment and interest rates then prevailing."

262 U. S. 288.

Likewise in *Bluefield Co. vs. Pub. Serv. Comm.*, 262 U. S. 679, this Court said:

"*Rate of return.* The state commission found that the company's net annual income should be approximately $37,000, in order to enable it to earn 8 per cent. for return and depreciation upon the value of its property as fixed by it. Deducting 2 per cent. for depreciation, there remains 6 per cent. on $460,000, amounting to $27,600 for return. This was approved by the state court.

• • •

"Under the facts and circumstances indicated by the record, we think that a rate of return of 6 per cent. upon the value of the property is substantially too low to constitute just compensation for the use of the property employed to render the service."

262 U. S. 692, 695.

In *Brush Elec. Co. vs. Galveston*, 262 U. S. 443, the lower court (affirmed by this Court) used the same method of computing annual depreciation allowance and fair return on value. The master found the *present* value, on the basis of cost of reproduction less depreciation.

"This he held to be the fair present value of the property. Upon this valuation he recommended an annual return of 8% and an annual rate for depreciation of 4½%.

• • •

"The lower court accepted the master's estimate of 8% upon the value as a fair rate of return, but fixed 4% instead of 4½% as a fair rate for annual depreciation."

262 U. S. 445.

In *Georgia Ry. vs. R. R. Comm.*, 262 U. S. 625, the *amount* of the "rate-base" was disputed, both (1) as the base for the computation of fair return *on* property and *also* (2) as the base for computation of annual depreciation allowance. The lower court's valuation was sustained *for both purposes*, this Court holding that the second objection, like the first, depended upon the *value* of the property.

> "The other objections relate to the amount of the depreciation charge. The companies say the rate should be 2½ per cent. The Commission and the court allowed only 2 per cent. This question is one of fact, and we are not convinced that it was wrongly decided below. *The amount of the depreciation charge is also objected to on the ground that the percentage should have been figured on a larger value. This objection depends upon the value to be placed upon the physical property which has already been discussed.*" (Italics ours.)
>
> 262 U. S. 633.

In one of the cases above quoted this Court divided sharply as to *which* is *the* proper rate base, whether *value* or *cost*—*not* as to *how many* rate bases there are. None of the Justices has ever expressed an opinion that there could be one rate base, viz., *value*, for return *on* property and another, viz., *cost*, for depreciation, *i. e.*, return *of* property. On the contrary MR. JUSTICE BRANDEIS in his dissenting opinions has mentioned modern accounting [*Southwestern Bell Telephone Co. vs. Public Service Commission*, 262 U. S. 309, *supra*, 89-90]—and particularly *depreciation accounting* [*Pacific Gas Co. vs. San Francisco*, 265 U. S. 403, 423-425]—as advantages of adopting "prudent investment" as *the* "rate base." His opinions do not suggest that "prudent investment," *i. e., cost, not value*, already *is* the "rate base" for depreciation allowance, though *not* for fair return on property.

In *Michigan Public Utilities Commission vs. Michigan S.*

Telephone Company, 228 Mich. 658, P. U. R. 1925 C, 158, 163-164, the Court said:

> "Some contend that the proper basis for valuation is prudent investment cost. See dissenting opinion of MR. JUSTICE BRANDEIS, *Missouri ex rel. Southwestern Bell Teleph. Co. vs. Public Service Commission,* 262 U. S. 276, 67 L. ed. 981, P. U. R. 1923 C, 193, 43 Sup. Ct. Rep. 544, 31 A. L. R. 807; Goddard on Fair Value of Public Utilities, 22 Mich. Law Rev. 777. But it is settled that the rate base is present fair value as defined in *Smyth vs. Ames, supra,* and in the *Minnesota Rate Cases,* 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916 A, 18. Computing depreciation (although perhaps convenient to accountants and bookkeepers), on investment cost, or book cost, as distinguished from present fair value, must be rejected. If the rate base is present fair value, then the depreciation base as to depreciable property is the same thing. There is no principle to sustain a holding that a utility may earn on the present fair value of its property devoted to public service, but that it must accept and the public must pay depreciation on book cost or investment cost, regardless of present fair value. We repeat, the purpose of permitting a depreciation charge is to compensate the utility for property consumed in service, and the duty of the Commission, guided by experience in ratemaking, is to spread this charge fairly over the years of the life of the property."

In *United Fuel Gas Co. vs. Railroad Commission,* 13 F. (2d), 510, 523, [affirmed without deciding this question, *United Gas Co. vs. Railroad Commission,* 278 U. S. 300], JUDGE HICKENLOOPER held that annual depreciation must be figured upon *value* rather than *cost.*

If for the retirement of property, now worth say $3,000,000, which originally cost $2,000,000, only $2,000,000 can be provided through depreciation allowance out of earnings, then the other $1,000,000 must be *lost* by the utility, either (1) by a net shrinkage of $1,000,000 in the

total value of its property or (2) by investing $1,000,000 of *additional capital* to replace the retired property and preserve the *same* total value *without* creating any *additional value*. This would mean that "the company *is* bound to see its property gradually waste, without making provision out of earnings for its replacement," [*contra, Knoxville vs. Water Co.*, 212 U. S. 1, 13] or else to *buy* year by year from its customers the very *property that already belongs to it*. In other words, though the excess of the value (in present dollars) of its property over cost (in past dollars) cannot be confiscated by depriving the utility of a return of say 8 per cent. on this value, yet this excess may be confiscated by depriving it of 100 per cent. from year to year and from day to day as property is retired.

In *State ex rel. Hopkins vs. Southwestern Bell Telephone Company*, 115 Kan. 236, P. U. R. 1924 D, 388, the Commissioner in his report (printed as an appendix to the opinion of the Court [P. U. R. 1924, D, 433]) said:

> "To what should the depreciation apply—the original cost, or the value of the property? It has been suggested by the state that, even though a return be allowed upon the value of the property, rather than upon the original investment in the property, the allowance for depreciation should be made upon the basis of the investment rather than upon the value of the property. One of the engineers for the state has testified that whichever theory is followed, whether it be that of protection of the investment or the value of the property, it should be consistently followed as to both the earnings and depreciation. There seems to me to be no escape from this conclusion. Whatever it is that is to be protected, there are two factors that enter into that protection; the allowance of a fair return, and the preservation of the property through a depreciation allowance. If the law is that a return should be figured upon the value of the property rather than upon the original investment in the property, it must be that the depreciation charge should be similarly figured.

"An illustration showing the reason for allowing a depreciation upon the value of the property rather than upon the original investment may be helpful. John Smith individually owns a telephone plant in which he invested $100,000. Assume now that the plant lived ten years and on account of increased prices it required $200,000 to duplicate the plant. At the end of that period the entire plant must be replaced. If his original investment of $100,000 is all, that is returned to him, and the plant is reconstructed and he puts his $100,000 back into the plant, and John Jones puts in the other $100,000 necessary to reproduce the identical plant, John Smith now owns but one-half the plant where theretofore he owned all of it. In that case, of course, his original investment has been protected, but his property has not been protected. So, in my judgment, the question of whether depreciation should be allowed upon the original investment or upon the value of the property resolves itself into the question heretofore discussed, and that is, whether the law contemplates the protection of the property or the protection of the original investment. In a way it is even more true of depreciation than of return, for telephone plants do not die, but are kept alive by replacements made from year to year, and these replacements must be made at present prices, and not at original cost."

P. U. R. 1924 D, 465.

For such invasion of constitutional rights the only excuse offered is certain alleged rules and methods of accounting. Among accountants a disposition to subordinate both *law* and *facts* to methods and convenience of *accounting* is not uncommon. The proper—and important—function of accounting is to *record facts,* not to *change facts* or to determine or change their legal significance. If for a particular purpose at hand, *e. g.,* valuation or ratemaking, the *facts* recorded by good accounting are *not* legally controlling or relevant, this may or may not be a good reason why accountants should modify or supplement their methods. Certainly this circumstance gives accountants no license to

change the law and the Constitution, to ignore material facts or to give controlling weight to other facts *not* in law material.

Primarily *accounting* is concerned with and based upon *cost,* not value; in ratemaking the *Constitution* and the *law* are concerned with *value.* In accounting cognizance is taken of value only in particular circumstances, *e. g.,* in respect of inventories or by specially writing books up or down from cost to value, as determined by an appraisal or valuation. Whether or not books should be so rewritten is an *accounting* question not material here. *Cost* does not become *value* by writing it in a book; *value* does not lose its *legal significance* or its *constitutional protection* because it is *not* written in a book. If this Court had been influenced by mere methods and convenience of accounting it would have adopted *cost,* instead of *value,* as the "rate base" on which utilities are entitled to earn a return, as urged in the dissenting opinions of Mr. Justice Brandeis.

Whenever cost is material, *e. g.,* when depreciation is computed for income tax purposes, *(cost* being the *statutory* basis for computing taxable gain), then accounting rules and methods may furnish means for determining such cost—and such depreciation on such a cost basis. [*United States vs. Ludey,* 274 U. S. 295.] So too, as was remarked by Judge Rose in language quoted by Judge Ulman [R. 69], "in the absence of great changes in value" book cost "would be a fairly accurate measure for present value." [*Chesapeake & Potomac Telephone Co. vs. Whitman,* 3 F. (2d) 938, 942.] In other words, whenever *in fact* cost and value are not materially different in amount, then book cost (though *not* material *as such*) may conveniently and with approximate accuracy be used as *evidence* of *value.* [*Board of Commissioners vs. N. Y. Telephone Co.,* 271 U. S. 23, 27.] When, however, cost is not material but *value* is and *in fact* cost and value are materially different in amount, then accounting rules and methods concerning cost will *not* deter-

mine value or depreciation in value. As has already been said, Constitution, law and facts can not be changed by, or subordinated to, methods and convenience of accounting.

There is *no judicial* authority for such subordination of law to accounting and establishment of two rate bases, value for return *on* property, cost for return *of* property, except a master's report in *Georgia Railway & Power Co. vs. Railroad Commission,* P. U. R. 1925 A, 546, 594-595. In this respect the master's report is contrary to the clear implication of the previous language of this Court in the same case [*supra,* 91]. The very fact that several commissions—by no means all [*Cincinnati and Suburban Bell Telephone Co.,* P. U. R., 1924 E, 849]—have held otherwise and that convenience is a temptation to subordinate law to accounting only emphasizes the lack of *judicial* support for so convenient a form of confiscation.

In the state courts the Commission's counsel quoted a report (also quoted in the Commisison's opinion [R. 43]) of the Interstate Commerce Commission as to *accounting* rules and regulations concerning depreciation. [*Depreciation Charges of Telephone Companies* and *Depreciation Charges of Steam Railroad Companies,* 118 I. C. C. 295.] That long, able report contains much controversial matter, which does not become law by being there stated. Indeed, on its face the entire report relates to *accounting* and does not purport to relate directly to *ratemaking.* This last comment is also applicable to a statement (quoted by the Commission's counsel from Whitten-Wilcox on Valuation of Public Service Corporations, §853) of the *accounting* practice of the American Telephone & Telegraph Company, which includes an express statement that "this method [computation of depreciation charges on the basis of cost] tends to certainty and definiteness in the *accounting*" [italic ours]. The Michigan telephone case [*supra,* 91-92] shows that in *ratemaking* the Bell System does not subordinate its legal rights to its accounting practice.

III.

THE ABOLITION OF THE SECOND FARE TO HALETHORPE IS UNCONSTITUTIONAL AND CONFISCATORY.

The Company is doubly in the grip of arbitrary power if by the same Commission order (1) its rates as a whole can be limited to a return that "can only rest in the judgment of the Commission" and (2) a fare on an unprofitable line, amounting to $40,000 a year, can be abolished altogether on the ground that rates as a whole are not confiscatory.

There are no disputed facts about Halethorpe. The testimony [R. 423-432, 524, 620-631, 758-770, 773-783, 834-835, 925-926, 1052-1065, 1078-1102, 1213-1222, 1245-1246] consists principally of the obvious fact that Halethorpe real estate developers would benefit by abolition of the second fare and Halethorpe residents would prefer one fare to two and of argument about equally obvious facts.

Halethorpe is an unincorporated community in Baltimore County, southwest of Baltimore City, 1.87 miles beyond the city limits. Baltimore City is not in any county. The city limits are not a circle. Nor is what the Commission calls "the center of the city," *i. e.*, the "business center," Baltimore and Charles Streets, a geographical center. This "center" is nearer the city limits at the southwest than anywhere else. Consequently a ride from the "center" to this nearest city boundary, viz., 4⅜ miles, is shorter than any other ride from the "center" to the city limits, viz., from 5⅜ to 8¼ miles. [R. 101.]

In 1918 the Baltimore City limits were extended, so as to increase the area of the city almost 200 per cent. and the population less than 20 per cent. [*supra,* 63], by the annexation of much rural territory [Acts of 1918, Chapter 82, section 10; *infra,* 113]. There is still rural property within the old city limits, as extended in 1888, [Acts of 1927,

Chapter 331, amending Public Local Laws, Article 4, section 4; *infra,* 114. *Williams vs. Broening, Mayor,* 135 Md. 226, 236], and much rural and semi-rural territory, at the southwest as well as in other parts, within the present limits. [R. 1214.] [See map, Halethorpe Exhibit C, R. 1606. Present 1918 boundary shown much fainter than 1888 boundary and previous boundary.]

After annexation in 1918 the Commission gradually imposed on the Company zone extensions to the new city limits. In 1924, at an annual cost of upwards of $500,000 to the Company, the Commission extended *all* first fare zones to the city limits, thus establishing a single fare within the city limits, regardless of distance, density of population, expense, return to the Company or any other consideration. [R. 265-266, 275-276.]

In extending all first fare zones to the city limits the Commission ordered a few short overlaps beyond the city limits. There are now five such overlaps—one of 1⅜ miles to Dundalk Junction on the Sparrows Point and River View lines, one of 1 mile on the Woodlawn line and three others not more than half a mile. [R. 104.] *No other first fare zone extends as far beyond the city limits as Halethorpe is.* The Sparrows Point line is one of the Company's best paying lines [R. 1213]; the Dundalk overlap was ordered to give residents on that line a short single fare connection with River View, (a Company pleasure resort). [R. 1219.] The Commission in its opinion says:

> "While it is true that the purpose of the Commission in extending fare zones in previous cases was to extend them only to the new city limits, and to make the city line the limit of the single fare zone, it recognizes the fact that in some cases those zones were extended substantial distances beyond the city boundary. In most cases these extensions were made to meet special conditions, and the Commission did not, and does not now, consider them precedents for general extensions of single fare zones beyond the city limits." [R. 51.]

As the Court of Appeals says, "the extension to Hale-

thorpe is not profitable, was built at a loss at the request of the inhabitants of the territory served by it, and it is intimated, upon their assurance that they would not ask that it be included in the city fare zone." [R. 1652; 155 Md. 606; *infra*, 151-152, R. 1213.] On the other hand before the Commission witnesses for the complaining real estate developers testified that the value of a single carfare is capitalized as added land value and prices are increased accordingly. [R. 1097-1098.]

The expense to the Company and the profit to real estate developers from suburban extension is stated in the Commission's opinion in general terms which are particularly applicable to Halethorpe.

> "That the extension of the railway system into the suburbs has resulted in the development of the sections which the lines serve is beyond question. Even in these days of almost universal use of the automobile, property values, except perhaps in that part of the City as it existed prior to the annexation of 1888, are dependent largely upon street railway transportation. Withdrawal or material curtailment of service would be felt immediately in the lowering of real estate values, for there is no transportation agency which could give so comprehensive a service at such low cost.
>
> "Moreover, the development of property and the creation of higher values along the outlying lines of the Company often have been largely at the *expense* of the Company. While creating increased values in land by the extension of its lines and service, thus benefiting immediately the property owner (and the City and County by increasing the taxable basis), the Company has no way of sharing in the increased values it creates until the time comes when there is sufficient development in new territory to produce enough traffic to make the operation of the lines compensatory. Until that time is reached, the Company is compelled to give service to new territory at a loss. This is not the case with gas, electric or telephone companies, for as lines of such companies are extended into new or sparsely settled sections, those receiving and benefiting by their

service are required to pay part of the cost of building the extension, being reimbursed as new customers come on the lines. Many of the Company's lines which extend into the suburbs are still operated at a loss.

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"One reason for the Company's plight today is the fact that following annexation in 1918, the city zones on the street car system were extended to the new city line, this line for nearly the entire distance around the City having been extended about two miles. Annexation, while a desirable thing for the City, did not benefit the Railways Company in the slightest degree. Indeed, it imposed additional obligations upon it, and when extensions of fare zones were made it caused extensive loss of revenue which had to be made up through rate increases." [R. 22-23.]

In abolishing the second fare to Halethorpe the Commission has confiscated the Company's property for the private benefit of real estate developers. The effect of the Commission's order is to reduce the price of street car rides, thereby increase the price of land at Halethorpe and thus compel the Company to subsidize real estate developments that have already proved profitable to the developers but not to the Company.

To this charge of confiscation the Commission and the state courts reply (1) that it is sufficient if the Company's rates as a whole are not confiscatory and (2) that the second fare to Halethorpe is unjustly discriminatory. *Neither the Commission nor the state courts find the second fare to Halethorpe in itself unreasonable.*

1. Though exceptional circumstances, *e. g.*, a long established *status quo*, may justify an unremunerative rate for part of a street railway system when rates as a whole are remunerative [*Puget Sound Traction Company vs. Reynolds*, 244 U. S. 574, 579-581] gratuitous service can not be required and unremunerative rates can not arbitrarily be

made still more unremunerative. On the contrary the general rule is that a street railway, like other utilities, is entitled to substantial compensation for each part of its business.

In *Banton vs. Belt Line Railway,* 268 U. S. 413, this Court, holding unconstitutional a commission order fixing a joint street car fare, said:

> "There is involved only the rates applicable to a part of the company's business. In this respect the case is similar to *Northern Pacific Railway vs. North Dakota,* 236 U. S. 585; *Norfolk & Western Ry. vs. West Virginia,* 236 U. S. 605, and *Northern Pacific Railway vs. Department of Public Works of Washington,* 268 U. S. 39. The applicable law is plain. The State is without power to require the traffic covered by the fare enjoined to be carried at a loss or without substantial compensation over its proper cost. And such cost includes not only the expenditures, if any, incurred exclusively for the traffic, but also a just proportion of the expenses incurred for all traffic of which that in question forms a part. The cost of doing such business is not, and properly cannot be, limited to the amount by which total operating expenses would be diminished by the elimination of, or increased by adding, the transfer passengers in question. It would be arbitrary and unjust to charge to that class of business only the amount by which the operating expenses were, or would be, increased by adding that to the other traffic carried. Outlays are none the less attributable to transfer passengers because also applicable to other traffic. Operating expenses which are incurred on account of all passengers carried, and which are not capable of direct allocation to any class, should be attributed to the transfer passengers in question in like proportion as such expenses are fairly chargeable to other passengers receiving like service. While the carrier has no constitutional right to the same rate or percentage of return on all its business, the State may not select any class of traffic for arbitrary control and regulation. Broad as is its power to regulate, the State does not enjoy the freedom of an owner. Appellee's property is held in

private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners. *Northern Pacific Railway vs. North Dakota, supra,* 595, 596; *Norfolk & Western Ry. vs. West Virginia, supra,* 609; *Interstate Commerce Commission vs. Chicago, G. W. Ry,* 209 U. S. 108, 118."

268 U. S. 421-422.

See also *Chicago, etc., Railway vs. Public Utilities Commission,* 274 U. S. 344.

The fact that a railroad company voluntarily established and continues unremunerative commutation rates to a certain suburban point on its line does not justify a commission in requiring the establishment of unremunerative commutation rates to more distant points on the same line. A commission order requiring such extension of commutation rates deprives the railroad company of property without due process of law. [*Public Service Commission vs. Atlanta & W. P. R. Railroad Company,* 164 Ga. 822, P. U. R. 1928 B, 136.]

2. (*a*) There is no evidence to support a finding of *unjust* discrimination *against Halethorpe.* Zone lines must be drawn somewhere. Wherever they are drawn somebody will be nearest beyond the line—unless all second fares are abolished. If the Commission may first adopt the city line as its standard, (by which to burden the Company with successive zone extensions), and then as soon as this standard is attained may adopt a contradictory standard, viz., "the center of the city," (by which to burden the Company with another series of zone extensions), the inevitable result will be the abolition of all second fares. "The center of the city" is a standard never before used by the Commission or the Company, incompatible with the city line standard adopted and applied by the Commission at the Company's expense. The Company need not maintain that the city line standard is the only possible standard, though it is a com-

mon standard frequently established by statute [*Portland Railway Company vs. Oregon R. R. Commission,* 229 U. S. 397, 407]. It is enough that the Commission, having adopted and applied this standard and still paying lip service to it [*supra,* 98], can not now, as a pretext for further burdening the Company, characterize as "unjust discrimination" the truism that its own standard is inconsistent with an inconsistent standard.

The Commission's suggestion of "legislative discrimination" against Halethorpe in the Annexation Act of 1918 [R. 51] can not be intended to be taken literally. As this Court judicially knows, and everybody in Maryland knows, no community desiring annexation is ever denied annexation; the usual complaint is exactly the opposite, viz., that annexation is imposed without the consent of the annexed [*Hunter vs. Pittsburgh,* 207 U. S. 161], as was done and bitterly complained of in this very annexation of 1918 [*McGraw vs. Merryman,* 133 Md. 247]. The only "legislative discrimination against that territory lying to the southwest of the old city boundary" consisted of the continued opportunity to enjoy exemption from city burdens extended to annexed territory and at the same time to enjoy many benefits of proximity to the city.

The Court of Appeals says the city line standard "was established apparently with the consent of the Company that there might be a single fare within the city limits, and has certainly been disregarded in at least several instances." [R. 1652; 155 Md. 606; *infra,* 151.] The Company's consent (to the extent of not contesting the Commission's action) to one standard certainly does not estop the Company from resisting imposition of another wholly incompatible standard. Nor do five short overlaps beyond the boundaries of a city containing 95 square miles destroy or impair the city line standard as a standard or justify total disregard of the standard in the imposition of arbitrary burdens on the Company.

None of these five overlaps, in sections of the city remote from Halethorpe, is injurious to Halethorpe. There is no evidence that these overlaps have prevented anybody from living in Halethorpe or have otherwise injured the people of Halethorpe. The evidence does show that real estate promotions are developed more rapidly with a single fare than with two. In this respect the Halethorpe developers would doubtless benefit by being put on an equality with all the many suburban developments within the city limits. The five overlaps make an imponderable addition to the many single fare suburban developments that are within the city limits. These overlaps do not injure Halethorpe; if they injure anybody they injure adjoining developments across the city line, which must share with these county neighbors the benefit of a single carfare.

The facts in the instant case do not remotely resemble those in *Portland Railway Company vs. Oregon R. R. Commission,* 229 U. S. 397, 411-412, cited in the Commission's opinion. In that case the unjust discrimination did *not* consist in extending all first fare zones to the city limits; an Oregon statute did just that [229 U. S. 407]. Nor did it consist in overlaps of first fare zones beyond the city limits. The unjust discrimination included fares of ten cents from one point 1.35 miles beyond the city limits and five cents from another point 3.50 miles beyond the limits [229 U. S. 399, 401, 402, 404]. Nor was it shown that either fares as a whole or the particular fares in question were confiscatory [229 U. S. 413.]

(*b*) The shorter answer to the charge of discrimination is that if any departure from the city line standard—or if the city line standard itself—were unjustly discriminatory against Halethorpe, then the Company *at its option* would be entitled to remove the discrimination *either* by abolishing the second fare to Halethorpe or by abolishing the five overlaps—or even by shortening first fare zones within the

city limits if a single city fare were itself deemed unjustly discriminatory. If a rate reasonable in itself is unjustly discriminatory the utility *at its option* may remove the discrimination either by reducing the higher or increasing the lower rate [*Chicago, I. and L. Ry. vs. United States,* 270 U. S. 287, 293; *United States vs. Illinois Central R. R.,* 263 U. S. 515, 521; *American Express Co. vs. Caldwell,* 244 U. S. 617, 624]. This fundamental right, which does not need elaboration, was insisted on by the Company before the Commission and in the state courts, but was ignored by the Commission and the courts.

Conclusion.

In No. 55 on the Company's appeal the decree of the Court of Appeals should be reversed. In No. 64 the Commission's cross-appeal should be dismissed and its petition for certiorari denied for want of jurisdiction, or on the merits the decree of the Court of Appeals *quoad* the Commission's cross-appeal should be affirmed.

Respectfully submitted,

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APPENDIX A.

Maryland Statutes Cited in Brief.

[The text of *all* Maryland statutory provisions cited in the brief is here quoted, for the possible convenience of the Court, *not* because the Company deems *any* of these statutory provisions controlling or the text important in the instant case.]

Annotated Code of Maryland (Edition of 1924 and 1929 Supplement), Article 23, Corporations.

353. [1910, ch. 180 (Public Service Commission Law), sec. 6; 1912, ch. 563; 1924, ch. 48; 1927, ch. 201]. * * * Whenever application, protest or other form of complaint is made to the commission of or concerning any act or omission, any service, regulation, equipment, appliance or facilities, or the adequacy or quality thereof, any preference or advantage or any prejudice, disadvantage or any discrimination, any rates, tolls, fares or charges, or any regulations or practices with respect thereto, or of or concerning any other matter or thing done, permitted, maintained or omitted to be done by any person, firm or corporation, subject to the jurisdiction of the commission, with respect to any of the requirements imposed by the Public Service Commission Law, or by any other law, by any charter, franchise or ordinance, by any order of the commission or otherwise, it shall be the duty of the People's Counsel, upon a *prima facie* case, or otherwise, to participate in the preparation or reforming of the pleadings before the commission, if need be, or investigating or further investigating the facts or evidence upon which the application, complaint or protest is based or may be based and to appear before the commission in respect to investigations or in support of applications or complaints by or on behalf of or in the interest of the public or in defense of the public interests when involved, and the services of the experts employed by said commission as well as the records and other facilities of the

commission shall be availed of by the People's Counsel in the performance of these public duties; provided that nothing herein contained shall be construed to prevent any party or interest in any proceedings before said commission from appearing in person or from being represented by counsel.

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385. [1910, ch. 180, sec. 30.] The commission shall, whenever it may deem it desirable to do so, investigate and ascertain the fair value of property of any corporation subject to the provisions of this sub-title and used by it for the convenience of the public. For the purpose of such investigation the commission is authorized to employ such engineers, experts and other assistants as may be necessary. Such investigations shall be prosecuted with diligence and thoroughness, and the results thereof reported to the legislature at each regular session. Such valuation shall show the value of the property of every such corporation as a whole, and the value of its property in each of the several counties and municipalities within the State of Maryland. Every such valuation shall be so made and ascertained by the commission that as far as possible it shall not disturb the value of bonds of said corporation issued prior to April 5, 1910.

Every such corporation shall furnish to the commission from time to time, and as the commission may require, maps, profiles, contracts, reports of engineers and other documents, records and papers, or copies of any and all of the same in aid of such investigation, and to determine the value of the property of such corporation used for the public service, and every such corporation is required to cooperate with the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may reasonably direct. The commission shall thereafter, in like manner, keep itself informed of all extensions and improvements or other changes

in the condition of the property of the said corporations and ascertain the fair value thereof, and from time to time, as may be required for the regulation of corporations under the provisions of this sub-title, revise and correct its valuation of the property of such corporations. To enable the commission to make such changes and corrections in its valuation, every corporation subject to the provisions of this sub-title is hereby required to report currently to the commission, and as the commission may require, all improvements and changes in its property and to file with the commission copies of all contracts for such improvements at the time same are executed.

Whenever the commission shall have completed the valuation of property of any such corporation and before such valuation shall become final, the commission shall give notice in the manner prescribed in this sub-title for the service of a copy of an order upon such corporation, to the company or companies owning or operating such property, stating the valuation placed upon the several lines of roads or classes of property of the said company used by it for the convenience of the public, and shall allow the company or companies a reasonable time in which to file a protest of same with the commission. If no protest is filed within such time such valuation shall become final. If notice of contest is filed by any such corporation, the commission shall fix a time for hearing of the same, and shall proceed as promptly as may be possible to hear and consider any matter relative and material thereto which may be presented in support of said protest. If after hearing any contest of such valuation, under the provisions of this subtitle, the commission is of the opinion that the tentative valuation is incorrect, it shall make such changes as shall make the same a fair valuation of such property and shall issue an order to make such corrected valuation final. All final valuations by the commission shall be *prima facie* evi-

dence of the value of said property in proceedings had in pursuance of this sub-title.

387. [1910, ch. 180, sec. 31½.] Every gas corporation and every electrical corporation shall furnish and provide such service, instrumentalities and facilities as shall be reasonably safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation and electrical corporation for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission; "and all acts or parts of acts heretofore passed and now existing, prescribing or limiting the price at which any gas corporation or electrical corporation, or any other corporation subject to this sub-title, may furnish, sell or dispose of its gas or electricity or other product or utility are hereby repealed, it being the intent of this sub-title that the powers of the commission herein created to ascertain the price of such gas or electricity or other product of utility as provided for herein, shall supersede all such acts or parts of acts aforesaid." * * *

404. [1910, ch. 180, sec. 43.] Any corporation subject to this sub-title, or any of the provisions of this sub-title, and any person in interest being dissatisfied with any order of the commission, fixing any rate or rates, tolls, charges, schedules, joint rate or rates, or any order fixing any regulations, practices, acts or service, may commence any action in the circuit court for any county, or before any judge of the supreme bench of Baltimore City, in any court of Baltimore City of appropriate jurisdiction which may be adopted for the purpose, against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, tolls, charges, schedules, joint rate or rates fixed in such order is unlawful, or that any such regulation, practice, act or service fixed in such order is unreasonable, in which action a copy of the complaint shall be served with the summons.

The answer of the commission to the complaint shall be served and filed within twenty days after service of the complaint, whereupon said action shall be at issue and stand ready for trial upon fifteen days' notice to either party.

All such actions shall have precedence over any civil cause of a different nature pending in such court, and the said courts shall always be deemed open for the trial thereof, and the same shall be tried and determined as other civil actions.

Every proceeding, action or suit to set aside, vacate or amend any determination or order of the commission, or to enjoin the enforcement thereof or to prevent in any way such order or determination from becoming effective, shall be commenced, and every appeal to the courts or right or recourse to the courts shall be taken or exercised within sixty days after the entry or rendition of such order or determination, and the right to commence any such action, proceeding or suit, or to take or exercise any such appeal or right of recourse to the courts, shall determine absolutely at the end of such sixty days after such entry or rendition thereof.

No injunction shall issue suspending or staying any order of the commission, except upon application to one of the judges of the supreme bench of Baltimore City, or to the circuit court of one of the counties, and upon notice to the commisison and after hearing.

405. [1910, ch. 180, sec. 44.] If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or any commissioner, or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceedings

in said action for fifteen days from the date of such transmission.

Upon the receipt of such evidence the commission shall consider the same and may alter, modify, amend or rescind its order relating to such rate, or rates, tolls, charges, schedules, joint rate or rates, regulations, practice, act or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance.

If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

406. [1914, ch. 445, sec. 44½.] Before the trial of such action a transcript duly certified by the Secretary of the Commission of all the papers and proceedings, including evidence, in the case before the Commission except such as are omitted by the stipulation in writing of the parties to such action, shall be filed by the Commission in such action and shall be evidence in like manner as the originals transcribed.

407. [1910, ch. 180, sec. 45.] Either party to said action, within twenty days after service of a copy of the order or judgment of any court of Baltimore City or of the circuit court of any county, may appeal to the court of appeals of Maryland. Where an appeal is taken the cause shall, on the return of the record of the proceedings to the court of appeals of Maryland, be immediately placed on the docket of the then pending term of the court of appeals, and shall

be assigned and brought to a hearing in the same manner as other causes on the docket.

408. [1910, ch. 180, sec. 46.] In all trials, actions and proceedings arising under the provisions of this sub-title, or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission, or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful, as the case may be.

409. [1910, ch. 180, sec. 47.] In all actions and proceedings in court arising under this sub-title, all processes shall be served and the practice and rules of evidence shall be the same as in civil actions, except as otherwise herein provided. Every sheriff or other officer empowered to execute civil processes shall execute any process issued under the provisions of this sub-title, and shall receive such compensation therefore as may be prescribed by law for similar services.

Acts of 1900, Chapter 313, amending Public Local Laws, Article 4, section 796, to read:

796. The United Railways and Electric Company of Baltimore, its successors and assigns, shall charge five cents, and no more, as a fare for the conveyance of each passenger over twelve years of age, and three cents, and no more, for each child between the ages of four and twelve years, from any point on any of its lines to any other point on such lines within the City of Baltimore; provided, that such company shall give a free transfer, when the same shall be requested, upon the payment of each cash fare, which transfer shall be good at all points of intersection of lines of said railway for a continuous ride, except at such points on said lines where such form a route so as to permit a

passenger to return in the same general direction of the line upon which the transfer was issued, the privilege of the transfer not to apply to the terminus of any line or route; provided, that nothing in this Act shall be construed to affect any of the interests of the Mayor and City Council of Baltimore in the said United Railways and Electric Company of Baltimore, or any of the railways consolidated under the corporate name.

Acts of 1918, Chapter 82. [Annexation Act.]

Sec. 10. And Be It Further Enacted, That the territory annexed to Baltimore City, by this Act is hereby declared to be a taxing district, and, for the year 1919, the Board of Estimates and the Mayor and City Council of Baltimore, in fixing a tax rate, in the fall of 1918, under Section 40 of the Charter, shall fix the rate of taxation for local purposes in said taxing district at a sum equal to 60% of the full city rate which shall be fixed by said Board upon real estate situate within the limits of Baltimore City as they existed prior to the passage of the Act of 1888, Chapter 98; and, in like manner, for the year 1920, the said Board of Estimates shall fix the rate for local purposes in said taxing district at an amount equal to 62% of the said full city rate on real estate in said old city limits; and so on, from year to year, with an increase of 2% each year of the percentage of the full city rate which is fixed as the rate upon real estate in the said old city limits, until the rate in said taxing district and in said old city limits shall become the same. Beginning with the rate for the year 1939, and thereafter the tax rate shall be the same throughout the entire city limits of the City of Baltimore as enlarged by this Act, provided that nothing in this Act shall be intended to repeal or affect any law or ordinances now existing or which may hereafter be passed fixing different rates of taxation upon different classes of property, the intent of this provision being that, beginning with the year 1939 and thereafter, there shall be the same rate of taxation through-

out the entire limits of Baltimore City upon the same classes of property. * * *

Acts of 1927, Chapter 331, amending Public Local Laws, Article 4, section 4, to read:

4. All personal property situated or held in the territory annexed to Baltimore City by the Act of 1888, Chapter 98, shall be subject to levy, taxation and assessment in the same manner and form, and at the same rate of taxation as property of similar character or description within the old limits of said city may be subject. It shall be the duty of the Appeal Tax Court of said city to divide all the real and leasehold property in said territory into three separate classes, to be known as urban, suburban and rural property, for the purposes of city taxation, and to revise said classification annually for city taxation on or before October 1st of each and every year until and including the year 1938 (after which year all real and personal property in the Old Annex shall come under the provisions of Chapter 82 of the Acts of 1918 with respect to the uniformity of taxation within the entire city limits as enlarged by that Act), in accordance with the following classification, said three classes to be defined and subject to city taxation as follows:

(1) All real and leasehold property in said territory which is now legally liable to full city taxation, and all real and leasehold property situated in said annexed territory, located in a block of ground not exceeding 300,000 superficial square feet, formed and bounded on all sides by intersecting streets, avenues or alleys, opened, graded, curbed and otherwise improved from curb to curb by pavement, macadam, gravel or other substantial material shall be classified as urban property, and shall be subject to the same rate of city taxation as real and leasehold property within the old limits of said city may be subject. (2) Every lot, or piece of real and leasehold property to a depth not exceeding 200 feet situate in said territory, which fronts,

binds or abuts on any public street, avenue or highway, lighted at public expense, and completely paved from curb line to curb line, including gutters, with bitulithic asphalt, asphalt blocks, Belgian blocks, vitrified bricks, macadam in good condition, as heretofore laid before this section of this Article took effect, or if laid subsequent thereto, laid without direct assessment for the cost thereof, in whole or in part, upon the abutting property owners, unless the owners of a majority of front feet of property binding upon said street, avenue or highway, or the part thereof to be paved, expressly assent to said direct assessment, and laid in accordance with existing standards of proper macadam construction as laid under the supervision of the Highways Engineer, or other improved pavement (or with cobblestones laid before this section of this Article took effect, or laid subsequent thereto upon the assent of the owners of the majority of the front feet of property binding upon said street, avenue, or highway, or the part thereof to be paved), as distinguished from earth or gravel, which streets, avenues or highways are continuously connected by public or private streets, roads, avenues or highways paved from curb line to curb line, including gutters, with bitulithic, asphalt, asphalt blocks, Belgian blocks, vitrified bricks, macadam or other improved pavement or cobblestones, as distinguished from earth or gravel, within the territory embraced within the old city limits, shall be classified as suburban property, and shall be subject, for the purposes of city taxation for the year 1928 at a rate equal to sixty-seven per cent. of the rate to which urban property may be liable, and for the year 1929 at a rate equal to seventy per cent. of the rate to which urban property may be liable, and so on from year to year with an increase of three per cent. of the full city rate each year until and including the year 1938, after which such property shall be subject to the full city rate.

(3) All real and leasehold property in said annexed ter-

ritory which does not come under either the classification of urban or suburban property, as hereinbefore defined, shall be classified as a rural property, and shall be subject, for the purposes of city taxation, for the year 1928 at a rate equal to thirty-four per cent. of the rate to which urban property may be liable, and for the year 1929 at a rate equal to forty per cent. of the rate to which urban property may be liable, and so on from year to year with an increase of six per cent. of the full city rate each year until and including the year 1938, after which such property shall be subject to the full city rate. All the easements and rights of way of railroads and the tracks or other structures erected thereon, and all easements or other property located in, on, under or over the streets, roads, avenues, alleys, highways or ways in said annexed territory, shall be and hereafter remain subject to taxation as now or hereafter provided by law.

APPENDIX B.

Opinion of Court of Appeals With Record References Inserted.

IN COURT OF APPEALS OF MARYLAND. [R. 1622]

[Title omitted.] [155 Md. 572]

OPINION—Filed July 16, 1928.

JUDGE OFFUTT delivered the Opinion of the Court.
BOND, C. J., and PARKE, J., dissent in part.

The United Railways and Electric Company of Baltimore, came into existence on the fourth day of March, 1899, as the result of a merger of all the street railway lines operating in and near Baltimore, with a total authorized capitalization of $76,000,000, of which $38,000,000 was in bonds, $14,000,000 in preferred stock and $24,00,000 in common stock. [R. 122.] The base fare at that time charged by its several constituent companies within the city limits was five cents, and by Chapter 313 of the Acts of 1900 the consolidated corporation hereinafter called the Company was specifically limited to a fare of five cents for the transportation of adults and three cents for children from any point on its lines within said city to any other point thereon which could be reached directly or by transfer at intersecting points, and that schedule it maintained until 1918. [R. 118.] [155 Md. 575]

In the meantime, the State, moving with a growing trend throughout the country, had abandoned its traditional policy of regulating public service corporations by direct legislative action, and had by Chapter 180 of the Acts of 1910 created the Public Service Commission of Maryland, hereinafter called the Commission, to which it had committed plenary powers in respect to regulating the rates [*R. 1623]

and service of public utilities, and had repealed existing legislation fixing rates for service furnished by such utilities, such repeal to become effective when and as the Commission determined in accordance with the law that such rates should be superseded by others. *Gregg vs. Public Serv. Com.*, 121 Md. 30.

[**155 Md. 576] **And on July 19, 1918, the Company for the first time applied to the Commission for its approval of a schedule of rates under which it would receive six cents for adults and a uniform increase of one cent from children between four and twelve years of age and riders using commutation tickets. [R. 115.] The Commission was unable to hear the application immediately and the Company on August 28, 1918, with the assent of the Commission, filed a revised schedule which took effect October 1st, 1918, and remained in effect until January 7th, 1919, when it was formally approved by the Commission. [R. 117, 120.]

On May 23rd, 1919, the Company applied for a further increase from six to seven cents for cash fares with four tokens for twenty-five cents [R. 155], which it subsequently changed to a request that it be permitted to collect a cash fare of ten cents with two tokens for fifteen cents [R. 153], and on September 30th, 1919, it was permitted to charge a cash fare of seven cents or six and one-half cents when tickets or other tokens were purchased [R. 153, 216]. On December 26th, 1919, it again applied for an increase in its rate schedule [R. 235] and the Commission advanced the base fare from six and one-half cents to seven cents flat [R. 234, 244]. On March 31st, 1924, at the Company's request, the Commission [on May 26, 1924] authorized a further increase of the base fare to seven and one-half cents [R. 249, 274], and on August 1st, 1927, it filed an application for permission to increase its base fare to ten cents [R. 15, 89], which was one hundred per cent. more than it had charged prior to October 1st, 1918, and 33⅓ per cent. more

than it had been allowed to charge from March 31st, 1924, until it filed that application, and in connection with that request it alleged an apprehended financial crisis, and urged that it be allowed to put the increase in effect immediately as an emergency measure pending any hearing that might be had on its application for a permanent increase of its base fare to ten cents. The application for an emergency rate was denied, but on Feb*ruary 10th, 1928, the Commission passed an order [R. 57] which denied the application for an increase of the base fare to ten cents, but which permitted the Company [*R. 1624]

"to charge and **collect for the transportation of persons over its several street railway lines, in Baltimore City and vicinity, a base rate fare of eight and one-third cents when tickets or fare checks are purchased, or nine cents cash, for the conveyance of each passenger over twelve years of age, and five cents for each child between the ages of four and twelve years, between any of the points designated in the schedule of the said Company filed with the Commission pursuant to the requirements of the Commission's order No. 8240 entered in Case No. 1682 on May 26th, 1924, or between the intermediate points, in either direction, on any of such lines, except in so far as the zones on any of the said lines are hereinafter modified or changed. That the first fare zone on the Halethorpe line be and it is hereby extended to the terminus of the said line at Halethorpe, effective from and after midnight of February 12th, 1928." [R. 58.] [**155 Md. 577]

The Company, being dissatisfied with that order, on March 13th, 1928, filed, in Circuit Court No. 2 of Baltimore City, a bill of Complaint in which it asked that that order be nullified in so far as it or any previous order of the Commission prevented it from charging a flat ten cent fare, or, from continuing the first and second Halethorpe zones, and it further asked that the Commission be enjoined from enforcing that order or any prior order limiting the Com-

pany's rates [R. 5]. The Commission answered, the case was set down, evidence offered by the Commission, the Company and intervening persons interested in the matter, and after argument submitted for decree, and on May 11th, 1928, a decree was filed vacating the order in so far as the same purports to limit the rates of the plaintiff; except, however, as to that portion of said order which extended the first fare zone on the Halethorpe line to the terminus of said line at Halethorpe, as to which latter provision in said order "the bill of complaint is hereby dismissed," and enjoining the defendants from enforcing that or any other orders of the Commission in so far as they limit or purport to limit the rates of fare to be charged by the Com-
[*R. 1625] *pany [R. 85]. From that decree the Company and the Com-**
[**155 mission appealed [R. 88, 87], the Company on the ground
Md. 578] that the Court erred in abolishing the second zone on the Halethorpe line, and the Commission, on the ground that the Court erred in vacating so much of its order as affected the rate of fare to be charged by the Company, and in enjoining it from enforcing such order.

It may be noted that the relief granted in the decree is not precisely that prayed in the bill. The Commission by its order did three things: it refused the Company's application for a ten cent fare, it fixed an eight and one-third cents fare, and it consolidated the two Halethorpe zones in one. The appellee in its bill, asks that all orders of the Commission which limit its rates or prevent it from charging a ten cent fare be set aside, and that the Commission be enjoined from enforcing any such orders. The decree does not refer to a ten cent fare at all, but vacates all orders of the Commission, so far as they purport to limit the "rates of the plaintiff," and it based that ruling upon the Commission's "election" not to have the case remanded to them. But the Court clearly had no right to fix the Company's rates, since its function was judicial and confined to determining whether the order of

the Commission was valid or invalid, and if in its judgment the action of the Commission was unlawful it should have remanded the case to the Commission for such further action as might be appropriate, for even if in fact the eight and one-third cent rate allowed was inadequate to allow the Company a fair return on the value of its property, that fact did not oust the jurisdiction of the Commission to fix the Company's rates nor did it authorize the Court or the Company to fix them, for under the statute the power to do that is in the Commission alone. *Gregg vs. Public Service Commission,* supra; *Chenoweth vs. Public Serv. Com.,* 143 Md. 626; *Havre de Grace Bridge Co. vs. Public Service Commission,* 132 Md. 24, Code Art. 23, Sec. 375. But as the decree reads, it not only vacates the order of the Commission of February 10th, 1928, but in effect all other orders, affecting the Company's rate schedules, and it therefore either terminates this proceeding entirely** and leaves the Company free to file a new application for increased rates, or it leaves the question of rates altogether at the discretion of the Company. *But neither of those alternatives was authorized by anything in the statute, but if the order was invalid because it was unfair, confiscatory, unlawful or for any reason, it should have been vacated and the case remanded to the Commission for further proceedings in accordance with such guides, rules, and standards, as the Court might by appropriate order or decree direct.

[**155 Md. 579]

[*R. 1626]

The central dominating question presented by the appeal, is whether the schedules of rates promulgated by the Commission, is insufficient to yield such an income as will give to the Company a fair return on the value of its property. In the argument of the case it was said that the Commission had limited the Company to a return of 6.26% on the value of its property, but the order did not so state. What it did do, was to fix a schedule of rates, which after deducting the allowances approved by the Commission for maintenance, replacement, operation, financing and other expenses, would

yield that return, but if more efficient or economical management resulted in a larger net return there was nothing in the order to prevent the Company from retaining the benefit of that saving, even though it increased its net earnings to more than 6.26% of the value of its property. So that the question actually is, whether a schedule of fares which after deducting all reasonable and proper expenses for the management and operation of the Company permits it to earn a net return of 6.26% on the value of its property, is confiscatory within the meaning of the State and Federal Constitutions, or, unlawful and unreasonable within the meaning of the Statute creating the Commission. To that question there are various approaches, all differing in some degree in the effect they have upon the meaning and weight of the facts of the case.

It may be approached from the Company's point of view, in which case the Commission's function would be largely administrative, and the ultimate determination of the pro-
["155 Md. 580] "priety of its rates would rest with the Company, and the sole test of the lawfulness of such rates would be whether they were fair to it, and would yield what in its judgment was a proper return on the valuation of its property.

['R. 1627] 'It may be approached from the standpoint of the patrons of the service, in which event the power of the Commission to fix the rates would be bounded on one side by the rule that the rates must in no event exceed the value of the service and on the other by the rule that so long as the rates did not exceed the value of the service the Company was entitled to a fair return on the value of its property. Then there is a third approach, in which the question is viewed from the standpoint of the State, in which case, factors which from the standpoint of the public or the corporation have varying weights, such as the nature and necessity of the service, the effect of its continuance or withdrawal, both upon the security holders of the corporation, and upon

property values, and the welfare of the people in the territory served by it, the extent to which the State itself is a partner in the enterprise, and the circumstances and conditions under which the Company acquired and exercises its franchises and privileges may become of paramount and controlling importance, and in our judgment the question must be approached from that direction.

Before dealing specifically with it however, we will refer briefly and generally to the powers, functions and duties of the Commission, to the extent of its jurisdiction and to the weight to be given its decisions. That the power committed to the Commission is legislative in character, notwithstanding that the manner in which it is exercised is forensic, is no longer open to question, (*Gregg vs. Pub. Serv. Com.* supra; *Chenoweth vs. Pub. Ser. Com.* supra,) and except where limited by the statute itself or some constitutional provision the acts of the Commission done in the exercise of its statutory powers are entitled to the same weight which would be given a direct act of the legislature. *Knoxville vs. Knoxville Water Co.*, 212 U. S. 8; *Pub. Serv. Commn. vs. Byron*, 153 Md. 464.

"There has been and is some uncertainty as to the extent to which courts will go in reviewing the conclusions and decisions of such administrative agencies as the appellant. In *Interstate Commerce Commission vs. Union Pac. R. R. Co.*, 222 U. S. 541, in reviewing an order of that Commission, it was said: ["155 Md. 581]

> *"'There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in viola- ["R. 1628]

tion of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. * * *

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Illinois C. R. Co. vs. Interstate Commerce Commission,* 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts "further than to determine whether there was substantial evidence to sustain the order."

["155 Md. 582]

While in the later case of the *Ohio Valley Water Co. vs. Ben Avon Borough,* 253 U. S. 289, where the Supreme 'Court of Pennsylvania held that where there was substantial evidence to support them, the findings of the Public Service Commission would not be reviewed on appeal, the Court in reversing that decision said:

['R. 1629]

"The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. * * * In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; other-

wise the order is void because in conflict with the due process clause, 14th Amendment. * * *."

The question came before this Court and was decided in *Public Serv. Comm. vs. Byron*, supra, in accordance with the views expressed in *Interstate Commerce Com. vs. Union Pac. R. R. Co.*, supra. In that case, speaking through JUDGE PARKE, it was said:

> "The first rule is that the order will not be disturbed except upon clear and satisfactory evidence that it is unreasonable or unlawful. This is a legislative mandate which is reinforced by the fact that the commission is a tribunal erected by law, informed by experience, and assisted by a trained corps of subordinates. Code, art. 23, sec. 408; *Public Service Commission vs. North. Cent. Ry. Co.*, 122 Md. 355, 388, 391, 392; *Havre de Grace Bridge Co. vs. Public Service Commission*, 132 Md. 16, 24; *Interstate Commerce Commission vs. Union Pac. Ry. Co.*, 222 U. S. 541."

And that statement of the rule is not only supported by the weight of authority (see discussion in Dickinson on Administrative Law), but is required by the Statute itself, (Code, art. 23, sec. 408,) and appears to be indicated by the very nature and necessity of the thing for reasons pointed out by JUDGE PARKE in *Pub. Serv. Commn. vs. Byron*, supra. It is true that in *Ohio Valley Water Co. vs. Ben Avon Borough*, supra, the court "said that where the issue of confiscation 'was raised the due process clause of the 14th Amendment required that provision be made for submitting that question to some judicial tribunal authorized to adjudicate it upon its "own independent judgment as to both law and facts"; and that expression is consistent with the theory that in reviewing the decision of an administrative agency the court would review the facts as in an equity case. But such a conclusion is inconsistent with all prior decisions of the Supreme Court, and while in *Bluefields Water Works Co. vs. Pub. Serv. Commn.*, 262 U. S. 689, it was again stated that upon the question of confiscation the utility was en-

["155 Md. 583] ['R. 1630]

titled to the "independent judgment of the court as to both law and facts," it is not thought that by that language, the court in either of those cases, meant to say anything more than that where the facts are undisputed or must be taken as established, and the inference to be drawn from them inevitable, the courts will review any conclusion of law predicated upon such facts. But we do not believe that it was intended to overturn the policy established by the decisions of that court, and by many state and federal statutes which commits to such agencies as public service commissions the ascertainment of facts which rest in conflicting evidence, and we find therefore no inconsistency between the language quoted from those opinions and the language of this Court in *Public Serv. Commn. vs. Byron,* supra. And we feel too that in dealing with the constitutional question involved in confiscation some weight must be given to the statute, which places upon the person attacking the decision of the Commission the burden of establishing its unlawful or unreasonable character by "clear and satisfactory proof." *Pub. Serv. Commn. vs. Byron,* supra.

Reverting now to the main question presented by the appeal, the first inquiry is whether a schedule of rates which permits the appellee to earn 6.26% on the fair value of its property can be said to be confiscatory within the meaning of that clause of the 14th Amendment of the Federal Constitution which denies to the states the power of
["155 Md. 584] "depriving any person of his property without due process of law. Confiscation, in that sense, is essentially a relative, and not an absolute term, and it does not exist apart from the facts which are said to occasion it. No fixed or general rule can be announced by which it can be deter-
["R. 1631] "mined whether it exists in any given case, because whether it exists or not must be determined from factors which vary with the facts of each case, since rate cases like wills seldom have "twin brothers." *Covington & L. Turnpike Company vs. Sanford,* 164 U. S. 592 et seq., and we know of no

authority for the proposition that public utilities without regard to circumstances or conditions are entitled to a return of any given amount of percentage on the value of their properties. For while there are cases which hold that such utilities are entitled to a return of six or seven or eight per cent. on the value of their properties, they have no controlling weight, because the decisions are uniformly found to be based upon facts peculiar to the several cases. So in this particular case, in deciding whether the schedule of rates prescribed by the Commission, is confiscatory, we must be guided by the facts of this case, and are little aided by what this court or some other court may upon different facts have found to be lawful or confiscatory, fair or unreasonable rates.

To attempt to analyze in detail the mass of factual and opinion evidence adduced before the Commission is neither practicable nor necessary, since such facts as are relevant to the question before us rest for the most part in records of the Company or the Commission and are not in dispute, and we will at this time only refer to such as are necessary to indicate the contentions of the parties.

The total value of the Company's property including easements may be placed at $75,000,000. That was the valuation placed upon it by the Commission in [as of] 1924, and while there was some dispute as to whether that figure should not be increased to include additions since the valuation, that contention was not stressed in this court, but was treated as a matter of detail which could be adjusted to fit the facts at** some future time, so that the figure of $75,000,000 may be treated as the true value of the Company's property for all the purposes in this case. [**155 Md. 585]

The financial structure of the Company appears from the following tabulation in which the "basic value" of its property is assumed to be $70,000,000 [R. 335, 356], the

value placed upon it by the Commission exclusive of the value of the easements which has been fixed at $5,000,000;

[*R. 1632]

Class of Securities	Outstanding 12/31/1926	Per cent of basic value	Outstanding 6/30/1927	Per cent of basic value
Mortgage Bonds	47,405,000	67.7	47,405,000	67.7
Miscellaneous Obligations	6,392,700	9.1	7,664,200	10.9
Income Bonds	13,977,000	20.0	13,977,000	20.0
Total Bonds and Miscellaneous Obligations	67,774,700	96.7	69,046,200	98.7
Stocks	20,461,200	29.2	20,461,200	29.2
Grand Total	88,235,900	126.0	89,508.400	127.9

[People's Counsel Exhibit No. 4. R. 1473.]

And it appears that the Company has for some time past been paying, and still pays, dividends on its common stock at the rate of 4%, and that that stock, having a par value of $50 per share, has in late years sold on the Baltimore Stock Exchange at prices ranging from $16 to $21 per share [R. 556], and it further appears that its mortgage bonds bought at current market prices yield the purchaser a return of about 6%. From time to time since 1911, the Company has had occasion to borrow for varying periods, and the rates at which this money was bought, as shown by the following tabulation, throws some light upon the changes in its credit:

Issued	Description	Amount	Proceeds	Rate received	Interest rate
1911	2nd Half 3 Year Notes.....	$3,125,000	$3,046,876	97½	5%
1914	2nd Half 10 Year Car Trust Certificate	153,000	153,000	100	6%
1914	2nd Half 2 Year 5% Collateral Trust Notes	1,000,000	995,000	99½	5%
1914	2nd Half 1st Mtge. Gold Sinking Fund Bonds (Md. Elec. Rys.)...	489,000	469,440	96	5%
1916	Feb. 5 Year 5% Gold Notes.....	2,750,000	2,695,000	98	5%
1917	Oct. 6% Convertible Gold Notes..	3,000,000	2,850,000	95	6%
1919	5 Year Convertible Notes....	1,528,000	*	*	5%
1917	1st Mtge. Gold Bonds (Md. Elec. Rys.)	457,000	447,860	98	5%
1920	2nd Half Car Trust Certificates—Series 1920 (10 Years)	875,000	831,250	95	8%
1921	Feb. 7½ Coupons Gold Notes.....	1,500,000	1,383,750	92¼	7½%
1922	Apr. 1st Consol. Mort. 50 Year Gold Bonds	6,000,000	5,550,000	92½	6%

[*R. 1633]
[**155 Md. 586]

Issued		Description	Amount	Proceeds	Rate received	Interest rate
†1922		1st Consol. Mort. 50 Year 6% Gold Bonds	6,000,000	5,500,000	92½	6%
		In lieu of 4% Bonds ($2,684,000 @ $250 per Bond)		671,000		6%
1922	July	5 Year 6% Gold Notes.....	2,500,000	2,375,000	95	6%
1924	1st Half	1st & Refunding Gold Bonds Ser. A. (Md. Elec. Rys.)..	4,000,000	3,790,000	94¾	6½%
1927	July	3 Year Notes.....	2,500,000	2,412,000	96½	6%

[People's Counsel Exhibit No. 6. R. 1475.]

[**155 Md. 587]

**From another table filed by People's Counsel it appears that the net income of the Company, for the years from 1920 to 1926 inclusive was as follows:

1920—1,043,599.21 1921—{[635,230.58] 735,230.58 1922— 799,268.99 1923—976,266.38

1924— 976,068.39 1925— 980,609.53 1926—1,010,054.41

and that for the same period the operating income was:

1920—17,313,589.84 1921—16,332,865.34 1922—16,122,592.02

1923—16,461,798.86 1924—16,453,254.31 1925—16,621,220.20

1926—16,715,709.07

[People's Counsel Exhibit No. 12. R. 1496.]
[†This item is a duplication in the opinion.]

*Another tabulation filed on behalf of the people indicated the following ratio of funded debt to track operation per mile, and gross revenue per dollar in a number of American cities: [*R. 1635]

	Funded debt and income bonds	Funded debt per mile of track operation	Funded debt per dollar gross revenue
Baltimore	67,774,700	164,000	4.05
Without Income Bonds	53,797,700	130,000	3.22
Detroit	35,155,000	88,000	1.63
Los Angeles	19,852,000		1.64
San Francisco	11,695,000	42,600	1.19
Pittsburgh	34,215,000	57,700	1.57
Boston	49,819,000	100,200	1.41
Cleveland	5,495,000	13,310	.30
St. Louis	52,590,000	120,900	2.80
St. Paul, Minn.	19,478,000	38,700	1.40
Buffalo	25,392,782	62,200	2.47
Providence	13,714,000	47,200	1.61
Washington	5,606,000	77,000	1.21
Cincinnati	5,288,400	19,840	.65
Indianapolis	13,497,517	56,300	2.35
Denver	10,863,500	48,900	2.38

[People's Counsel Exhibit No. 5. R. 1474.]

Still another table showed the current rates of fare, rate of return, and base in twelve representative American cities comparable in size to Baltimore, to be as follows:

[**155 Md. 588]

**	Rate of return	Base	Fare
Baltimore (New Fare)	6.26	$75,000,000	9c— 3 for 25c
Boston	4.64	159,025,142	10c— 4 for 25c (limited)
Chicago Surface Lines	6.27	164,600,000	7c— 3 for 20c
Cincinnati	4.16	36,381,017	10c— 3 for 25c
Cleveland	4.35	37,106,506	7c— 8 for 50c
Kansas City	1.82	23,300,000	8c—15 for $1.00
Los Angeles	3.06	54,000,000	5c
Philadelphia [5.97]	5.07	216,000,000	8c— 2 for 15c
Pittsburgh	5.85	68,170,000	10c— 3 for 25c
St. Louis	4.66	52,024,192	8c— 2 for 15c
San Francisco	5.37	35,000,000	5c
Washington	4.69	50,000,000	8c— 6 for 40c

[People's Counsel Exhibit No. 25. R. 1517.]

And another table [People's Counsel Exhibit No. 24. R. 1511-1516] lists seventy-nine American cities each having a
[*R. 1636] popula*tion of over 100,000, and shows the population of each city, the rate of fare charged on the street railways, and commutation privileges, established in connection with such fares in each city. In analyzing that table Mr. H. Carl Wolf, engineer for the Commission, testified:

"Of the 81 cities listed as having a population of 100,000 or more, only 19 of them have a fare higher than Baltimore. There are 30 cities with a ten cent fare. Only one of these has a straight ten cent fare with no tokens. Ten of them, or one-third the number have an eight and one-third cent token fare, six of them have an eight and one-third cent token fare, plus a pass system, one of them has a seven and a half cent token fare, plus a pass system, and when the Commission recalls that at the present time 97% of the full fare passengers in Baltimore are using the token fare they will see that the ten cent-seven and a half cent fare, plus a weekly pass, if applied to Baltimore, would cause practically no increase in fare, and probably a decrease.

There is one of these 30 cities with a ten cent fare which has not a token fare but which does have a pass, and 11 of them with ten cent fares charge 7½c or lower for tokens with no passes." [R. 1016.]

[**155 Md. 589] **And in criticising that analysis Mr. C. D. Emmons, president of the Company, said:

"I have this from the late bulletin; that the trend of fares over the United States has been upward since July 1, 1923, and is continuing upward. On October 1, 1927, the average fare of 272 cities reporting was 7.9516 cents and November 1, 1927, the average fare was 7.9846 cents, which is the highest average fare that the street railway industry has ever had, not excluding the War period.

There are at the present time, or since the November bul-

letin, there have been twelve different cities that have changed the rate of fare. There are three interurban roads that have changed the rate of fare. At the present time there are fourteen fare cases pending.

Q. What are the direction of those changes?

A. The changes are all up with the exception of a municipal city which has put in a weekly pass, and the information here does not say about the flat fare. I presume it's the same, a flat fare with a weekly pass. I think they give *a [*R. 1637]
statement that there are only, I have forgotten, of basic 10c fare cities, but my statement here is that there are—I got this morning, dated November 26th, from New York—this gives 219 United States cities.

Q. Having a basic fare of 10c?

A. That's right, yes.

(Mr. Tingley): Those are not cities of over 100,000?

(The Witness): No, but I counted the cities of over 100,000 in this and there are 31 cities of over 100,000 that have a basic 10c fare. * * * [What follows, in answer to *subsequent* questions, is a list of *30* cities (of *over or under* 100,000), *including Boston,* that have a *flat* 10c fare, "without any tickets at all except maybe like Boston as those from local lines of 4 for 25c, but they are not down in the city, and to my mind do not exclude Boston in any way from the flat 10c cities."]

(The Witness): [Berwyn, Illinois;] Cicero, Illinois, 65,400; Forest Park, Illinois, 10,768; Maywood, Illinois, 12,072; Oak Park, Illinois, 53,500; Auburn, Maine, 16,985; Bangor, Maine, 25,978; Bath, Maine, 14,731; Lewiston, Maine, 35,500; Billerica, Massachusetts, 3,646; Boston, Massachusetts, 787,000; Braintree, Massachusetts, 10,580; Concord, Massachusetts, 6,461; Framingham, Massachusetts, 17,033; Holyoke, Massachusetts, 60,400; Lexington, Massachusetts, 6,-

["155 Md. 590]

350; Natick, Massachusetts, 10,907; Needham, "Massachusetts, 7,012; Newburyport, Massachusetts, 15,618; Newtonville, Massachusetts, 5,700; Wakefield, Massachusetts, 13,025; Waltham, Massachusetts, 35,700; Wellesley, Massachusetts, 6,224; Woburn, Massachusetts, 16,574; Worcester, Massachusetts, 193,300; Morristown, New Jersey, 12,548; Ocean City, New Jersey, 3,721; Lackawanna, New York, 17,918; Mauchnuck, Pennsylvania, 3,666; West Chester, Pennsylvania, 11,717. • • •

(Mr. Clark): How many states now have you cited there?

(The Witness): Six states." [R. 1120-1122.]

From other tables it appears that the wages of "platform" men have increased from a maximum of 22c an hour in 1913 to a maximum of 53c an hour in 1926 [1927], [Company Exhibit No. 15. R. 1413], that other wages showed an approximately similar increase [Company Exhibit No. 16. R. 1414-1416], and that during the same period the general cost of living showed an increase from a base index of 100 to an index of 173. [Company Exhibits Nos. 20, 29. R. 1420, 1460.]

Perhaps the most significant fact connected with the question before us is the decline in the number of revenue passengers carried by the Company from 253,834,179 in 1919

*R. 1638]

to 225,225,633 in 1926, and 145,256,760 (August ap*proximated) for eight months of 1927. [Company's Exhibit No. 2. R. 1388-1389. *Cf.* Company's Exhibit No. 13, R. 1409-1411, showing 10,000,000 of this decrease was *not* decrease in *passengers* but decrease in fares due to zone extensions in 1924.] Coincident with that decline was a gradual increase in the rates of fare from 5c prior to 1919 to 7½c in 1927, and an increase in the registration of automobiles [in Maryland] from 85,430 in 1919 to 267,649 in 1926. [Company Exhibit No. 11. R. 1406.]

In connection with those figures a further fact appears

which is that while the total number of revenue passengers is decreasing, the peak load of passengers that is the greatest number of passengers carried during the "rush hours" each day has increased, and to accommodate that increasing demand, it has become necessary for the Company to maintain an increased equipment which is to some degree idle during a part of the day. [R. 712, 1244.]

One of the contentions made by the Company was that the existing rates so affect its credit that it is compelled to pay unreasonably high rates for money, and in connection with that contention it filed a table showing the rates it has paid since 1920, which in part shows:

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Date of Issue	Amount of Issue	Less Banker's Commission	Cost of Money to Company	Market Price
July 1, 1920 Car Trust 8% Gold Certificates	875,000	43,750	9¾%	100
Jan. 15, 1921 Ten Year, 7½% Gold Notes	1,500,000	90,000	8.70%	98¼
Mar. 1, 1922 First Consolidated Mortgage, 6s, due March 1, 1949	6,000,000	270,000	6.75%	97
Mar. 1, 1922 Deposit $250 per $1,000 bond by holders of $2,684,000, First Consolidated Mortgage 4s to secure additional 2% interest coupons	671,000	28,903	6.60%	—
Aug. 1, 1922 Five Year, 6% Gold Notes	2,500,000	75,000	7.27%	98
Jan. 1, 1928 Maryland Electric Rwys. Co. First and Refunding Mortgage Gold Bonds; Series "A"—6½% due Jan. 1, 1957	4,000,000	210,000	6.93%	100
Mar. 1, 1927 Three Year, 6% Gold Notes	2,500,000	62,500	7.32%	99¼

[Company Exhibit No. 31. R. 1462.]

These facts are but a small part of those to be found in the mass of evidence contained in the record, but they are sufficient to indicate the grounds for the conflicting contentions of the parties to this appeal, which as we understand them are in substance as follows:

[*R. 1639] *In respect to the main question the appellant appears to contend that the schedule of fares promulgated by the Commission, is, under existing conditions, all that the service is worth, and fair alike to the Company and the public, but, that whether fair to the Company or not no higher rates should be allowed, because the Company is only entitled to collect from the public the value of the service it renders.

[**155 Md. 592] The contention of the Company on the other hand seems to be that it is entitled to earn a fair return on the value of** its property, that "fair return" means a return of at least 8% on the value thereof, and that it is entitled to a schedule of rates high enough to insure that return regardless of the value of its service to the public. Or reduced to its lowest terms, and quoting its own language the Company's proposition is, that "compulsory limitation of the Company's rates to yield a maximum of less than eight per cent. is confiscatory and unlawful," while the Commission contends that "rates must in no event exceed the value of the service, regardless of return or confiscation," and somewhere between those extreme theories lies the law.

Manifestly the proposition submitted by the Company is broader than the law while that of the Commission is too indefinite and vague to be of much aid in settling the question before us. There is so far as we know no rule of law which guarantees to public service corporations the right to earn eight per cent. on the value of their properties regardless of the fairness of their rates to the public or of any other fact or circumstance, but the law as stated in *Covington & L. Turnpike Co. vs. Sandford*, supra, is to the contrary, there it is said (page 596): "It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the Company (as was

alleged and as the demurrer admitted) could not earn more than 4% on its capital stock. It cannot be said that a corporation operating a public highway is entitled, as of right, and without reference to the interests of the public to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates *to be charged by a [*R. 1640
corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is **reasonable and just for [**155
the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use the property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." Nor is there any rule by which we may precisely determine what is the actual value to the public of such service as that which the Company sells. Md. 593]

When the Company speaks of a "return of not less than eight per cent." on its property it must be remembered, that nearly $68,000,000 of its actual value, is covered by bonded indebtedness or other obligations bearing a fixed rate of interest far below that rate, and that the balance of the eight per cent. return remaining after paying that interest would go to the holders of stock having a par value of $20,461,200, the real value of which is seven million dollars, if the easements are valued at $5,000,000 or $2,000,000 if they are excluded which would necessarily be greater than an eight per cent. return on the value of that stock. But

aside from that, and assuming that the rate schedule will yield less than eight per cent. on the actual value of all the Company's property, or even less than eight per cent. on the actual value of the stock, that fact alone cannot characterize it as confiscatory, but other factors must be considered.

It is argued that an eight per cent. return is necessary to enable the Company to borrow money at reasonable rates, and that the fact that it is limited to a rate schedule which will yield a return of only 6.26% puts it at a disadvantage as a borrower and weakens its credit. But the evidence fails to support that contention. It is true that there is in the
[*R. 1641] record a mass of subjective and highly conjectural tes*timony pro and con relating to it, much of which tends to support the Company's contention, but, whilst its useful-
[**155 Md. 594] ness may be conceded, the speculative opinions of ex**perts who are themselves interested in increasing the rate of return on similar utilities cannot be substituted for the judgment of the Commission, and accepted as a conclusive determination of the question, at least where the judgment of the Commission is based upon substantive evidence.

The value of such securities as the obligations of public utility companies depends in the main upon the security they offer as well as the rate of return which they will pay the investor. And it is quite as reasonable to assume that the fact that the ratio of the Company's funded debt to the value of its property, is as the Commission found approximately 90%, affects its credit, as the fact that it can only earn 6.26 on the value of its property.

In connection with that contention the Company asserts that the use of the automobile for the transportation of those who otherwise would use its lines has increased to such an extent, that it has reduced its net revenue to such a point, that any rate schedule indicating a return of less than 8% on the value of its property impairs the security offered

investors, and lessens the confidence of the public in its financial stability, and that therefore it is entitled as of right to a schedule which will insure such a rate of return regardless of its effect on that part of the public who for one reason or other are obliged to use its lines. But, if as the Company contends, it is required to pay more for its money because of the risk resulting from the increasing competition of the private automobile, it certainly cannot expect to correct that condition by raising its rates to such a point that investors will purchase its stock as a gambling or speculative venture. Nor in fact do we see any occasion for the gloomy outlook of the Company's witnesses. It appears to be well and economically managed, and the market price of its securities indicates continued public confidence in its stability, as well as in its ability to liquidate its obligations, when and as they accrue, and from the volume of its business there is little likelihood that it will cease to be a highly productive property not only useful but essential to the city's welfare and the public convenience, and profitable to its owners, provided "sufficient 'allowance is made for keeping its property from depreciating. ["155 Md. 595] ['R. 1642]

There seems to be no question but that the private automobile is a serious competitor of the Company, and it is estimated that it carries about twenty-five per cent. of those who would but for it use the street cars, and it is possible that it may make further inroads on its business, regardless of rates. In fact the Company rather repudiates the idea that rates have any substantial effect upon the volume of its traffic, but attributes its decline almost entirely to the automobile, although as a matter of common sense there must be some substantial relation between transportation rates and the volume of traffic. But irrespective of that the Company's contention ignores one very important if not controlling consideration, and that is that it is a "public" service company, and that practically speaking the substantial value of all its property is due primarily to franchises and

privileges which it has secured from the State, upon the condition, express or implied but always present, that it will give in return adequate service at reasonable rates. Those privileges include not only the right to do business and operate its lines over public highways, but also protection against any other agency offering to perform the same service in the same territory. So that when the Company contends that since conditions which neither it nor any one else can control, increase the expense of its service, that it should be permitted not only to transfer that entire burden to that part of the public who must of necessity use its lines, but to also increase its net earnings beyond a point they have ever reached, it ignores the very patent fact, that if the State withdrew from it the protection from competition by other public service companies offering the same service, which it now enjoys, its very existence would be threatened. The mere fact therefore that increasing automobile competition has made it more expensive for the Company to serve those who do use its lines, while it justifies increasing its rates to a point which will absorb the increased expense, affords no excuse for still further increasing them to a point which will not only be burdensome to the "traveling public but will at the same time yield to the Company a greater return than it has 'ever received, and greater than that usually received by others operating in the same field elsewhere under substantially the same conditions.

["155 Md. 596] ['R. 1643]

Whether a given rate is burdensome to the public, involves the question of the value of the service, and presents an extremely difficult and troublesome question, the answer to which, except in extreme cases, can only rest in the judgment of the Commission operating upon varying factors each of which is entitled to some weight, but no one of which ordinarily is controlling.

One consideration suggested is the diminished purchasing value of the dollar, the increase in wages, and the fact

that wages have risen higher than the cost of living, on the theory that as the public has more money to spend, it suffers no hardship if it is required to spend more, and that by judicious management it may for that reason be brought from a five cent to a ten cent state of mind without any serious physical or mental disturbance or inconvenience. But while that theory may have a certain appeal for the Company, it is too refined and delicate for general and practical use, and although it might have a material and substantial relation to the operating expenses of the Company, it has no apparent relation to the value of its service. The fact that it cost one man three dollars to grow a bushel of wheat is no reason why a purchaser should be compelled to pay him three dollars for it, if in fact, measured by the market it is only worth two, and ordinarily the affluence of the buyer has no perceptible relation to the value of the product of the seller. Whilst not strictly analogous, recent developments in the ice business tend to illustrate the fallacy of that contention. It is a matter of general knowledge that the manufacture and sale of machines for artificial refrigeration, and the manufacture of ice in homes, has had a serious effect on the artificial and natural ice business as formerly conducted. But assuming that the ice business is a public utility and its rates subject to regulation, it would be manifestly unreasonable to allow an ice company to charge to its patrons the losses it "had suffered from the inroads of competitors, by requiring them to pay rates high enough to absorb these losses. ["155 Md. 597]

Another factor suggested is that a decrease in the volume of traffic indicates that the rates are burdensome, and 'there is some force in that suggestion, but the difficulty in this case lies in attributing the decline to the increase of fares. So far as the facts go, it may be due either to that or to the increasing use of the automobile. Whether it is due to one or the other is a matter of unguided conjecture. For while there is in the record a confused mass of contradictory fig- ['R. 1644]

ures relating to the effect of increased rates on the volume of traffic, it is impossible to deduce from them any definite or sound conclusion.

Nor can the value be determined by comparison, by the market, or by what it would cost an individual to obtain by a privately owned agency the same service. There is no other public agency rendering the same service with which the company can be compared, for it is protected in a monopoly, and for the same reason there is no general market by which the value of its service can be ascertained, nor would it be reasonable to measure its value by what it costs the owner of an automobile to operate it so as to give like service, because of the difference in machines and in the expense incident to their operation, and because there is no fair comparison between the operation of a private automobile and a public service corporation operated as a monopoly and for profit. So that in determining whether the rates fixed by the Commission are confiscatory we are finally remitted to a few simple realities, such as the past earnings of the Company, the returns usually received by other companies engaged in the same business in other fields under somewhat similar conditions, the rates which the Company has voluntarily fixed for its service in the past, the decrease in the purchasing power of the dollar, and the effect which other orders of the Commission have had upon the earning power of the Company.

It may be assumed that the base fare prior to the formation of the Commission was reasonable because up to that time no complaint had been made of it by the Company and "in 1900 it was fixed by an act of the Legislature, which has never been challenged. The fare then was five cents which would be approximately equal to 8⅓ cents today when the decreased purchasing value of the dollar is considered, and if that were all the question would be free from difficulty, for if 5 cents was fair then the equivalent

"155 Md. 598]

of the value which five cents had then should be fair now. *But there are other factors which affect it, such as the extension of the city fare zone so as to embrace all the new territory brought into the city by the Annexation of 1918, the effect of which was to relieve a part of the public of the burden of an extra fare possibly at the expense of the Company and certainly of the remaining part of the public, and also the fact that certain of the operating expenses of the company such as the cost of labor increased in a ratio greater than that in which the purchasing power of the dollar declined, for although speaking generally the dollar now will purchase perhaps sixty per cent. of what it would in 1913 it will not purchase as much as fifty per cent. of the labor which the Company could have bought with it then. [*R. 1645]

But these factors were considered fully by the Commission when it fixed the base fare at 7½ cents in 1924, and in view of that finding and of the further fact that the record does not disclose any data sufficiently specific to enable us to say that it was unlawful, we are not inclined to give them any controlling weight now, especially as the schedule fixed by the order in this case is designed to give the Company a higher return on its property than it received prior to the extensions.

It also appears that if the schedule produces the results anticipated by the Commission that the net earnings of the Company in comparison with the value of its property will be as great if not greater than at any time in so much of its history as has been called to our attention, and that it will yield a return thereon with one possible exception higher than that now received by any company engaged in the same business under conditions at all comparable to those obtaining in Baltimore and its environs, and higher, than the inter**est rate allowed by statute in this State, Code, art. 49, sec. 1. After giving due consideration to these several factors, and to Code, art. 23, sec. 408, we are unable to say that the schedule of fares promulgated by the order [**155 Md. 599]

appealed from was unlawful, unreasonable or confiscatory, which permits a return of 6.26 on the value of the Company's property, and it follows that so much of the opinion of the trial court as set aside that part of the order and enjoined its enforcement was in error. And that conclusion seems to be in accord with such authority as there is on the
[*R. 1646] subject. In the case of *Smyth vs. Ames,* 169 U. S. *545, the court expressly reaffirmed and approved the statement in *Covington & L. Turnpike Co.* supra, to which we have referred. *McCardle vs. Ind. Water Co.,* 272 U. S. 419, cited by appellee, can scarcely be considered authority to the contrary. For aside from the fact that the decision in that case was based upon facts essentially different from those in this case, it merely held upon those facts that at that time a rate of seven per cent. was not confiscatory. In respect to that question it said: "The evidence is more than sufficient to sustain the rate of seven per cent. found by the Commission." And while there is a certain ambiguity inherent in that expression, it certainly did not establish the rule that anything less than seven per cent. would in all cases have been confiscatory, and that is the interpretation placed upon it in the dissenting opinion of MR. JUSTICE BRANDEIS, where it is said: "To avoid the possibility of misunderstanding, I add merely that in my opinion the facts of record, considered in connection with those of which we have judicial notice, do not justify holding that rates which yield a return of less than 7 per cent. would be so unreasonably low as to be confiscatory." Nor is the case of *Railroad and Warehouse Commn. vs. Duluth Street Rwy. Co.,* 273 U. S. 625, in point. There the commission allowed a charge of six cents, but required the company to issue six tickets for not less than twenty-five cents. The District Court prohibited the enforcement of that rate and authorized the carrier to charge not more than six cents flat. On an appeal the Supreme Court only considered the ques-
155 Md. 600] tion of whether the District Court had jurisdiction to hear

the complaint, and the question of the reasonableness of the rates was not referred to.

There is certainly nothing in these cases nor in any other decision of the Supreme Court, which is the final authority upon the question involved in this appeal, which is in any way inconsistent with the decision of that Court in *Dayton-Goose Creek R. R. Co. vs. United States,* 263 U. S. 456, 481, in which the court through the Chief Justice in part said: "The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated [*R. 1647 to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profit. * * * The act fixes the fair return for the years here involved, 1920 and 1921, at 5½ per cent., and the Commission exercises its discretion to add one-half a per cent. The case of *Bluefield Waterworks and Improvment Co. vs. Public Serv. Commn.,* 262 U. S. 679, is cited to show that a return of 6 per cent. on the property of a public utility is confiscatory. But 6 per cent. was not found confiscatory in *Wilcox vs. Consolidated Gas Co.,* 212 U. S. 19, 48, 50; in *Cedar Rapids Gas-light Co. vs. Cedar Rapids,* 223 U. S. 655, 670; or in *Des Moines Gas Co. vs. Des Moines,* 238 U. S. 153. 172. Thus the question of the minimum of a fair percentage on value is shown to vary with the circumstances."

That statement has never been modified or overruled, and so far as we are advised is still the law.

Depreciation.

Assuming that a schedule of fares which will yield to the Company a return of 6.26% on the value of its property is neither confiscatory nor unreasonable as a matter of law, [**155 Md. 601] the next question is whether the schedule adopted by **the Commission in this case will in fact yield such a return. The answer to that question necessarily involves the allowance made for the depreciation of the Company's property used in the service to which it is dedicated. It is an elementary principle not only of constitutional law, but of common right, that such a Company must be permitted to earn such an income as will not only yield a fair return on the fair value of its property, but which will be sufficient to enable it to keep its property at a constant level of efficiency, so that it will be adequate for the public needs, and so that the value upon which the return is based will not be lessened. Anything more than that would be unjust [*R. 1348] *to the public, anything less than that would be unjust both to the public and to the Company. For the public should not be required to pay rates based upon the present value of the property if that value is to be permitted to steadily depreciate, nor, should the Company's property be consumed in the public service without adequate provision for restoring to it the equivalent of its value. So that the Company is entitled to such an allowance as will not only adequately provide for current repairs, but for depreciation due to necessary retirements, obsolescence, and the diminishing utility of property which cannot be arrested by repairs. So much is self-evident, is conceded by the parties to this appeal, and does not appear to be questioned anywhere. *Knoxville vs. Knoxville Water Company,* 212 U. S. 1, Rose's Notes.

The allowance made for current repairs under the head of maintenance does not appear to be questioned, so that the only inquiry is whether the allowance for depreciation

is adequate. The Commission in fixing the fare schedule allowed 5% on the gross revenue of the Company for depreciation, and estimated that that allowance would yield $883,544 in 1928 allowing for a decrease in the volume of traffic, and its opinion indicates that in reaching that conclusion it considered the cost and not the present value of the Company's depreciable property. Unquestionably there is authority for that method of calculating a proper depreciation reserve, but in our opinion it is artifi"cial, illogical and unsound, and ought not to be approved, and since we cannot say that proper methods would not have produced a result which would have affected the rate schedule adopted, the case should be remanded to the Commission in order that it may consider and determine the proper allowance for depreciation in accordance with rules hereinafter stated, and if necessary re-adjust the rate schedule to cover any changes it may make in that allowance. ["155 Md. 602]

The allowance of a given percentage on the gross income of the Company as a method for computing depreciation is said to be justified by accounting usages, but in such a case as this we are not dealing with bookkeeping customs, but with substantive rights protected by constitutional guaranties, and there seems to be no logical reason why the depreciation should not be based upon the actual value of the property itself, rather than upon vague and conjectural inferences drawn from the money the property earns. The accuracy of such a method must be largely subjective, since there is no apparent connection or relation between the income which property yields and the depreciation resulting from its use in earning that income. It is true that it is said to have been tested by more direct and intelligible methods, but if that is so such methods should have been used in the first place, and not as mere checks upon a method not justified either by law or logic. But even so, if the conclusion actually reached was proper, the fact that it was reached by improper methods, would ["R. 1649]

not justify us in disturbing it, so that the more important question is whether the base of the calculations by which it was tested was itself lawful. And that depends upon whether the Commission should have based its allowance for depreciation upon the original cost of the property, or upon its present value. It actually did use cost and not present value as the basis of its conclusion, and here again it must be said that there is authority for its procedure. But in our opinion it is justified by neither law nor right reason.

In valuing the property for rate making purposes the Commission based its conclusion upon its present value and not upon its original cost, and in fact the case of *Havre de* [**155 Md. 603] **Grace Bridge Co. vs. Pub. Serv. Commn.*, supra, left it no alternative. But if it was essential to adopt that method for ascertaining the value of the property to which the rates were applied, it is not easy to see why it should not be adopted in estimating the amount needed to replace that property when it is worn out or becomes obsolete and worthless. If the Company paid $100,000 for property now only worth $10,000, it would be grossly unfair to the public to base its annual depreciation on its cost, and if on the other hand the Company paid $10,000 for property now worth $100,000, it would be equally unfair to it to compel it to sell that property to the public at 10% of its real value. These conclusions seem to be self-evident, and while there is authority to the contrary, they are supported by the reasoning in such cases as the *Havre de Grace Bridge Co. vs. Pub. Serv. Commn.*, supra, *Knoxville vs. Knoxville Water Co.*, supra, and *Michigan Pub.* [*R. 1650] *Util. Commn. vs. Mich. St. Tel. Co.*, 228 Mich. 658, and *from the standpoint of fair play both to the Company and the public are inevitable. To require the Company to sell its service at rates which made no provision at all for the replacement or repair of the property when worn out or obsolete, would be plain confiscation, and to require it to

sell it at rates which make an inadequate provision for the return of its value when worn out or obsolete as a result of public service can be no less.

Counsel for the Commission suggest that to restore value would be to "require the financing of additions to plant, to the extent of the excess of replacement over original cost of property replaced, by the public, which would in turn have to pay a return on the capital thus required." The meaning of that suggestion is not altogether clear, but if it is that the Company is entitled to the return of any thing less than the value of its property it cannot be sustained. Money deducted from earnings to replace equipment which has become worn out or obsolete, by other equipment of the same character and the same value, adds nothing to Company's resources but merely keeps them at the same level.

"In testing the result arrived at by allowing a depreciation reserve of 5% on the gross income of the Company, the Commission appears to have been largely influenced by the history of the Company during the last few years. That is it appears to have concluded that since the Company had not actually expended its entire depreciation reserve in replacement, that it must have been sufficient. But that does not follow. The mere fact that it did not spend its entire reserve on replacements is not conclusive evidence that replacements which were not made, were not needed. For the Company may have been influenced by such considerations as the condition of the money and supply markets, whether the replacements should be postponed to harmonize with contemplated changes in equipment, or whether the maintenance of a substantial reserve was necessary to financial stability, and we do not regard that as an adequate test. But in our opinion there should have been some physical inspection of the property and investigation of the probable useful life of the property as shown by the experience of this company and other companies using simi- ["155 Md. 604]

lar property in the same way, and an estimate made based in part at least upon such an investigation of the probable
[*R. 1651] annual de*preciation. The Commission suggests that such a test could only be properly applied to accrued depreciation, but we see no force in that argument. If an inspection of equipment shows it to be in a fair condition of repair, and experience and judgment indicate that with reasonable care it should last for a reasonably certain time before becoming worthless, that would certainly seem to be a more reliable guide in determining its annual depreciation than the amount of money it earned, or, the fact that when similar equipment became worthless, the Company did not see fit to replace it.

The Company also takes sharp issue with the Commission on its policy in respect to obsolescence as an element of depreciation. It is difficult, because of the method of calculation adopted, to determine to what extent the Commission did con-
[**155 sider that question, except that it is clear that it did **not al-
Md. 605] low for extraordinary obsolescence, and in that conclusion we are in complete accord. But ordinary obsolescence is a tangible and concrete thing, for which some allowance should be made in any estimate of depreciation in such property as that operated by the Company. Experience infallibly indicates, that as a result of social or economic changes, or the progress of science and the improvement of mechanical and electrical equipment some part of the Company's property will from time to time become out of date, and unsuited to its present needs, and should be retired. Such obsolescence is really depreciation and should be considered in any fair or reasonable estimate of the probable annual depreciation of the Company's property. Extraordinary obsolescence however is quite another thing, and by extraordinary obsolescence we mean an extensive supersession of property used for the transmission or the generation of power, or instrumentalities used for the transportation of passengers. Such obsolescence has seldom occurred in the

past and whether it will occur in the future at all, or if it does when it will occur, and how extensive it will be are all matters of unrestrained speculation and conjecture, and we know of no theory upon which any depreciation allowance could be made to cover it. If it ever does occur, it can be considered by the Commission in the light of actual facts, and such allowance and adjustments made as may be proper under the circumstances, but until it does* occur it is entirely irrelevant to any consideration of the proper allowance to be made to cover the anticipated annual depreciation in the Company's property. [*R. 1652]

The last question raised by the appeal is whether the action of the Commission in abolishing the second fare zone on the Halethorpe line was unlawful, or unreasonable. In objecting to that action the Company has used the term "confiscation" with considerable freedom and some looseness. If, as we have held, rates yielding a return of 6.26 are not confiscatory in law, then it is difficult to see how extending the city fare zone to include Halethorpe is confiscatory, for** any loss occasioned by the extension is absorbed by the increased fares and does not in theory affect the rate of return, and if in fact it does affect that rate, such adjustment may be made by the Commission as actual experience shows to be necessary to enable the Company to earn a fair return on its whole property. Naturally some parts of the Company's system are more profitable than others, but that does not make it necessary to establish different fares for the different lines, varying in amount with the prosperity of the several lines. Some reliance was placed upon a supposed "city line standard," but the city line is a mere arbitrary invisible line of separation between political units, and the "standard" was established apparently with the consent of the Company that there might be a single fare within the city limits, and has certainly been disregarded in at least several instances. The extension to Halethorpe is not profitable, was built at a loss at the request of [**155 Md. 606]

the inhabitants of the territory served by it, and it is intimated, upon their assurance that they would not ask that it be included in the city fare zone. [R. 628.] It is nevertheless a part of the entire system, and the rates charged on it should be measured to some extent at least by the standards applied to other parts of the system.

The Commission found as a matter of fact that "the total distance from the center of the City that may be traveled on the Halethorpe line is a fraction more than five miles, while the single fare zones on nine other lines extending into the suburbs are longer than the two zones to Halethorpe. As pointed out by counsel, the first fare zones of six of these nine lines extend a substantial distance beyond
R. 1653] the Baltimore City limits. Five of them have no second fare zones whatever." That finding was based upon undisputed evidence, and in our judgment afforded a substantial basis for the action of the Commission in including the entire Halethorpe line within a single fare zone, and we cannot say that it was either unlawful or unreasonable, and we will not therefore disturb that part of its order which deals with that question. *North. Cent. Rwy. Co. vs. Pub. Serv. Commn.*, 122 Md. 255.

"155 "For reasons already stated it follows that so much of the
Md. 607] decree from which this appeal was taken as vacates that part of the order of the Commission which fixes the schedule of fares to be charged by the Company, and so much of said decree as enjoins the enforcement of that part of said order was erroneous, but because that schedule was in part based upon an allowance for annual depreciation arrived at by unlawful and unreasonable methods and by the use of an unlawful and unreasonable basis, that part of the decree will neither be affirmed nor reversed, but the case will be remanded in order that the Commission may further consider the question of depreciation and make any changes in the rate schedule which may be necessary and requisite to yield to the Company a fair and reasonable return upon the

fair value of its property. And so much of the decree as affirms that part of the order which extends the first fare zone of the Halethorpe line to the terminus thereof, will be affirmed.

Decree affirmed in part and reversed in part and case remanded for further proceedings in accordance with the views expressed in this opinion, each party to pay one-half the costs.

IN COURT OF APPEALS OF MARYLAND.

[Title omitted.]

CONCURRING OPINION—Filed July 23, 1928.

ADKINS, J., filed a concurring opinion as follows:

It will probably be thought a work of supererogation for one who agrees with the conclusions reached in the able *opinion written by JUDGE OFFUTT for the Court to file a concurring opinion. When the opinion is read as a whole there should be no misconception as to its meaning so far as any expressions therein are necessary to the conclusions. But it is always possible in reading detached expressions and considering them out of their setting to attribute to them a bearing not intended by the writer or by the Court. For that reason, and to make my own position clear, I file this memorandum, in which I desire to state what I understand** to be the meaning of JUDGE OFFUTT and of the Court as to the matters herein referred to.

[*R. 1654]

[**155 Md. 608]

It was not intended, as I understand, to suggest that there is anything in the record to indicate that a ten cent fare would be more than the service is worth if such a fare should be found necessary to pay for the cost of the service and to give the company a fair return on the value of its property. Nor, as I understand, was it intended to indicate that a finding of the commission as to the proper amount to be

allowed annually for accruing depreciation would be conclusive and unreviewable, even though the commission should base that finding on present value rather than the original cost, if the amount so found should be manifestly unreasonable on the whole evidence. Here, the question of confiscation is involved; and in any hearing by a Court on such a question it must be satisfied, not necessarily that it would have reached the same conclusion on the evidence, but, at least, that the conclusion reached by the commission was fairly deducible from the evidence. The opinion clearly indicates the kind of evidence on which a finding as to depreciation should be based.

There are some expressions in the opinion with which I am not in full accord, but they are not necessary to the conclusions reached. For instance, I do not agree with all that is said in what is designated in the opinion as the third method of approach to the question whether the schedule of fares authorized by the Commission is confiscatory within the meaning of the State and Federal Constitutions, or unlawful and unreasonable within the meaning of the statute creating the commission.

[*R. 1655]
[155 Md. 612]

IN COURT OF APPEALS OF MARYLAND.

[Title omitted.]

DISSENTING OPINION BY CHIEF JUDGE BOND—Filed Aug. 2, 1928.

I concur in what JUDGE PARKE has written, but would add these remarks in elaboration of some portions of it. It seems to me that so long as the present equipment and service of the utility are necessary to the public, it is a mistake to say that the ordinarily fair return on that property may
[**155 Md. 613]
be pared** down at all merely because there were formerly more riders for it, more profitably distributed. The fair

return on a utility property, for the service rendered with it, is to be calculated on present conditions only. The Supreme Court of the United States has said that the problem of a fair return is a problem of day by day, month by month, and year by year, as service continues. *Denver vs. Denver Water Co.*, 246 U. S. 178; *Detroit United Ry. vs. Detroit*, 248 U. S. 429. I take it that if a new owner—a purchaser at a sale, for instance—should offer to meet the existing need with the same or similar equipment, he could not be denied the ordinary fair return on property of such value merely because conditions were better at some previous time. Another and different situation would be presented if it could be found as a fact that this sort of service cannot get the fair return because the service would not be worth so much to users; but I do not see the foundation for that finding in this case. The evidence given on the point goes only so far as to predict that a fare of ten cents would keep away two per cent. of the present users [R. 694]. And, beyond that testimony, if the full fair return requires a fare of so much, ten cents, comparison of that amount with prices generally paid for other services, bus fares, for instance, or fares of steam or interurban electric railways for similar mileage, or prices paid for cheap commodities and entertainments, seems to me to render it impossible to say that it is more than street railway transportation for an average of some miles is worth to riders.

JUDGE PARKE authorizes me to add that these views are in accordance with his own.

IN COURT OF APPEALS OF MARYLAND. [*R. 1656]

[Title omitted.] [155 Md. 608]

DISSENTING OPINION OF JUDGE PARKE—Filed Aug. 2, 1928.

While agreeing with the conclusions of the Court that

the commission's method of determining the depreciation reserve was improper and that its order abolishing the second fare to Halethorpe was not unlawful, the writer believes the limita"tion of the rate of return to 6.26 per centum was unlawful and that the conclusions reached by the trial Judge were substantially correct.

["155 Md. 609]

As was declared in the *Railroad Commission Cases,* 116 U. S. 307, at p. 331, "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." If a public utility is deprived by a rate regulation of the right to receive a fair return upon the fair value of its property used in the public service, its property is confiscated, and the regulation is void, whether enacted by a legislative assembly or imposed by a commission pursuant to delegated authority. The determination of the constitutionality of a rate "depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two—pure matters of fact," as was said by Mr. Justice Holmes in *Prentis vs. Atlantic Coast Line,* 211 U. S. 210, 228. To adjudicate the value of the property of a public utility or to determine its earning capacity, or the resultant return upon this value of a proposed rate is essentially the exercise of a judicial function; and, for that reason, the statute provides for a review by the court in order that the owners of a utility be not deprived of their property without due process of law. *Chicago, Mil. & St. P. Rwy. Co. vs. Minnesota,* 134 U. S. 418, 457; *Reagan vs. Farmers Loan & Trust Co.,* 154 U. S. 362; *Ohio Valley Co. vs. Ben Avon Borough,* 253 U. S. 287. And this constitutional right to a judicial hearing in rate-making

*cases embraces not merely questions of law but also questions of fact, which are generally controlling. Supra. [*R. 1657]

So, the statute provides for a judicial inquiry by an action at law "to vacate and set aside any such order on the ground "that the rate or rates, tolls, charges, schedules, joint rate or rates, fixed in such order is unlawful, or that any such regulation, practice, act or service fixed in such order is unreasoanble." Code, art. 23, sec. 404. The mere provision for judicial review is sufficient to demonstrate that the findings of fact by the Commission are not made conclusive; and the statute deals with the point and makes the "determination, requirement, direction or order of the commission complained of" only *prima facie* correct by providing that "the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful, as the case may be." Code, art. 23, sec. 408; *Pub. Serv. Commn. vs. Byron,* 153 Md. 464, 470, 471, 479, et seq. [*155 Md. 610]

These provisions of the statute impose upon the court the duty of weighing and adjudging the facts upon which the unlawfulness or unreasonableness of the Commission's findings in the instant case depends, and, therefore, the Court cannot accept as final any determination of fact involved in the present controversy but only give it the *prima facie* presumption of correctness, so where the court thus finds from the facts that the action of the commission was either unlawful or unreasonable, it is not only the province but the plain and imperative duty of the court so to decide.

It is held by the commission that the subsisting street railway service is a method of transportation whose maintenance is necessary in the public interest, carrying more passengers during the hours of peak load than ever before

in its long history. The present system is, therefore, far from being moribund. So, whatever the risks of its urban business, none is greater than its operation under less than a fair rate of return and the uncertainty that this ruinous situation will be surely, timely and adequately relieved. A failure to grant such relief invites disaster; and stinted
[*R. 1658] *re**lief often simply delays a crisis which when it arrives
[**155 will prove immediately disastrous to the owners of the
Md. 611] utility and, in the end, to the interests of the public. The position of the utility is made graver, and the public will not ultimately be benefited by the ruling in the pending case since, in the opinion of the writer of this dissent, the weight of the evidence clearly and satisfactorily establishes that the Commission's limitation of the fair rate of return to 6.26 per centum of the value of its property is confiscatory and so unlawful. *Bluefield Company vs. Pub. Serv. Commn.*, 262 U. S. 679, 694-695.

Where the service rendered by the public utility is necessary, the owners of the utility are entitled to a return which will cover the expenses of operation and a fair return upon the property used. The right to compensation is fundamental since the property used represents capital invested, and since the continued existence of the utility depends upon the ability both to sustain its credit and to procure its capital requirements from time to time, a fair return on the property used means such a return as will induce capital to supply these financial demands. Capital is the most fluid and independent of commodities and none is more subject to the law of competition; and the rate at which money is borrowed is the best index of the financial position and condition of the borrower. Under existing circumstances, the utility can not find a market for preferred or common stock in order to obtain money for capital expenditures, and it has been compelled to procure funds through the issue of

bonds and short term notes. In the opinion of the Court is found a table showing the cost to the utility of slightly over $18,000,000 of money borrowed from July 1st, 1920, to March 1st, 1927, on bonds and securities. The average cost was 7.23 per centum. The lowest cost was 6.6 per centum for money borrowed in 1922 on bonds. The last loan was on March 1st, 1927, when $2,000,000.00 of three years 6 per centum gold notes were issued at a cost to the utility of 7.32 per centum. Without a sufficient supply of capital there can be no efficient nor economical administration of a municipal street railway system; and the onerous cost of these borrowings reflects the extent to which "the credit of the utility has been impaired by insufficiency of the revenues of *the Company and the uncertainty of its being allowed an increased rate of return on the value of the property which it employs for the public convenience. It would seem inevitable that a fair return on the property should be more than the cost of money obtained through the sale of bonds and other securities. *McCardle vs. Indianapolis Water Co.*, 272 U. S. 400, 419, 420. The clear and convincing testimony in this case is that a basic rate of 6.26 per centum is not a fair return upon the property used, nor sufficient to enable the utility to maintain its credit or to secure its necessary capital at a reasonable cost. [R. 535, 543, 1143, 1255, 1274, 1275, 1312-1313, 1336-1337.] This evidence cannot be denied its legal effect by comparing the fares and rates of return allowed to street railway utilities of other municipalities of similar size, where the local conditions and hazards are different and a park tax equivalent to one-half a cent for every fare is not added. Such evidence is entitled to some weight in considering the lawfulness of the rate of return in question, but it is obvious that its value is slight when so much depends upon the circumstances of every case and the nature and method of determining the rate base upon which the return is allowed.

[**155 Md. 612]
[*R. 1659]

It follows that this testimony cannot prevail over the clear and satisfactory evidence on the part of the utility that a rate of return of 6.26 per centum is not compensatory and that the case should have been remanded to the Commission to ascertain a rate which would not be confiscatory. *Public Serv. Commn. vs. North. Cent. Rwy. Co.*, 122 Md. 355, 389, 390.

FILE COPY

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 55.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Appellant,
v.
HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,
Appellees.

No. 64.

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER, AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,
Appellants,
v.
THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Appellee.

Appeal From, and Cross-Appeal From and Petition For Certiorari To, The Court of Appeals of the State of Maryland.

SPECIAL BRIEF FOR THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, APPELLANT IN NO. 55 AND CROSS-APPELLEE AND RESPONDENT IN NO. 64.

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The Issue Discussed in This Brief.

The purpose of this brief is to focus and summarize the constitutional principles which seem to the writer decisive of the case.

Although there is a voluminous record, the issues involved are comparatively simple. The chief of them, and the only one which will be discussed in this brief, is whether a net return of 6.26 per cent. upon the fair value of the property of The United Railways and Electric Company of Baltimore is, or is not, so unreasonably low as to deprive the Company of its property without due process of law.

The Street Railway Problem.

Apart from post-war costs (practically doubled) this particular type of public utility finds its business affected by the increased use of the private automobile. But, notwithstanding the traffic thus lost, the utility, under Commission regulation, must continue to render its service. Even the habitual automobile user insists on the street car as a standby. This combination of post-war costs and changed use of service has produced, the country over, successive increases in street car fares,—the amounts necessarily depending on local conditions. Variations may exist in the frequency of the service required; in the average length of the single fare ride; in the extent of free transfers; in taxes and public charges. Such and similar variations may make necessary in one locality a fare which will be greater or less than is required in another locality. In the instant case it will appear that there are special and peculiar reasons why there is required in Baltimore a higher fare than is needed in many other cities.

The Essential Facts in This Case.

The essential facts are fully set forth in appellant's main brief. However, for the sake of simplicity and clarity, a chronological abstract of them will be given.

Founded in 1899 by consolidation of various railways, the Company operates all the street railways in Baltimore and vicinity, and thus serves a population of 800,000.

As the result of the World War, operating costs of the Company were practically doubled. The use of private automobiles increased and continued to increase. While the Company continued to carry, through the rush hours, more passengers than before, its profitable off-peak and night traffic fell off. The Company, however, is compelled to keep ready for service substantially the same number of men and the same amount of equipment as in former years in order to meet the high demand of the rush hours.

Permission to put into effect fares that would give relief was asked from time to time of the Public Service Commission of Maryland. While increases were allowed, they were relatively small in comparison with increased wages and costs, and, where the Commission purported to grant relief, its orders at times were so hedged about with concessions to the public that the Company obtained little net relief. Although the Company was not earning a fair return, it did not ask further relief until, after many years of preparatory investigation, followed by prolonged hearings, the Commission, by unanimous vote, had valued the property, on which it was entitled to a return, at $75,000,000.

The Commission refused an application for emergency relief, and later, after a hearing, by Order of February 10, 1928, denied the increase to 10 cents asked for, but authorized the Company to put into effect a fare of three tickets for 25 cents for adults, or 9 cents to the passenger not buying tickets, while maintaining reduced fares for children under 12 years, for school children, and for commuters. This, in substance, was an increase of 5/6 of a cent in the base fare.

A fair reading of the Commission's opinion will show that, instead of determining what fares would produce a proper return, the Commission first determined what fare it would allow and then proceeded to find out what rate of return such a fare would produce; and, having estimated

that to be 6.26 per cent., declared that to be a reasonable return.

The Company appealed to the Maryland Courts. Judge Ulman, in the lower court, in a very able opinion, sustained the Company's contentions. The Commission then appealed to the Court of Appeals of Maryland, which Court, by a divided bench, upheld the finding of the Commission that a return of 6.26 per cent. would not be confiscatory; and, by a unanimous bench, held illegal the Commission's basis of computing allowance for depreciation.

In conformity with this decree, the Commission increased the depreciation allowance and also increased fares by an amount calculated to produce no more than the increase in depreciation allowance. This still left the estimated rate of return on valuation 6.26 per cent. Hence this appeal.

The Fair Value of the Company's Property is Not in Dispute.

The central issue in this case, as above stated, is simplified by reason of the fact that the fair value of the property of the Company is not here in dispute. Nor is there any question as to the fact that the Company is efficiently organized and administered, and its operations efficiently and economically conducted. This is expressly stated and conceded by both the Public Service Commission and the Courts of Maryland. (R. 1631, 155 Md. 584; R. 48, 1641, 155 Md. 594.)

There is not involved in this case, as the Maryland Court of Appeals seemed to think, any question as to the presumptive value to be ascribed by the courts to the findings of fact by the Public Service Commission. The true issue is the legal conclusion to be drawn from the undisputed facts as to what is, constitutionally speaking, the reasonable net return upon the value of its properties which the Company is to be permitted to obtain, if it can. As to this, this Court will exercise its own independent judgment.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287.

ARGUMENT.

In popular thought, a Public Service Commission exists to prevent rate increases; and it is almost inevitable that, when given, they will be compromises. It is obvious that, in the instant case, the fare was fixed, not in view, but in disregard, of a normal rate of return. And it is submitted that the Commission in so doing, and the Court below in sustaining the Commission, have misconceived the principles settled by the decisions of this Court. It is proposed briefly to summarize these principles; and to contrast with them the rulings below.

An examination of the cases seems, to the writer, to establish the following propositions:

The Company is constitutionally entitled to the right, that is, to the liberty, to earn, if it can, a reasonable net return on the rate base,—that is, the agreed valuation of its property devoted to and required for the public demand,—so long as it is efficiently and economically managed. What is a reasonable return, is a question in each case to be determined in the light of its special facts. At the time and under the conditions presented in *Willcox v. Consolidated Gas Co.* (212 U. S. 19) a net return of 6% was deemed sufficient to satisfy the minimum constitutional requirement; but such a rate cannot now be considered adequate in cases presenting different and more exacting features. A permissible rate of return must be sufficient to attract new capital to provide the required service: *Lincoln Gas & Elec. Co. v. Lincoln,* 250 U. S. 256; *Galveston Electric Co. v. Galveston,* 258 U. S. 388; *Bluefield Water Works and Improvement Co. v. Public Service Commission,* 262 U. S. 679; *Pacific Gas & Elec. Co. v. San Francisco,* 265 U. S. 403; *City of Fort Smith v. Southwestern Bell Tel. Co.,* 270 U. S. 627; *Ottinger v. Brooklyn Union Gas Co.,* 272 U. S. 579; *McCardle v. Indianapolis Water Co.,* 272 U. S. 400.

Confiscation is in the present tense; and it would be elaborating the obvious, to argue that new money can not be attracted to a street railway (no matter how sound its financial structure) if the investor's *permissible* return is limited to 6.26%. It is the stock, as well as the bond, investor whose viewpoint governs; *McCardle v. Indianapolis Water Co.*, 272 U. S. 400.

The Element of Risk in Its Relation to Reasonableness of Return.

There is a fairly well-formed present judgment upon the part of the federal courts that, where there is the ordinary element of risk involved in the financing and operating of a public utility, the public utility should be permitted to earn annually, if it can, at least 8 per cent. upon the fair present value of the properties employed by it in the service of the public. However, it is not contended by the Company in the case now at bar that this rate of return has hardened into a fixed figure.

There can be no denial of the fact that the street railway business is one that is attended by considerable financial risk to the investor.

The Maryland Public Service Commission has itself recognized this, for, in its opinion in this case, it says:

> "It is true, as counsel states, that in not one of those cases in which a utility was held entitled to earn a return of eight per cent., were the risks of the utility business as great as they now are in the street railway business. And it is, we believe, because of those very risks that capital is reluctant to invest in street railways, and that no new street railways are being built in the United States today." (R., 37.)

However, by a mode of reasoning which almost defies explanation (so totally lacking in logic is it) the Commission has held that this very risk which now inheres in the business of furnishing street railway transportation, is a ground for denying to the Company the right even to try out fares

estimated to produce more than 6.26 per cent. return upon the fair value of its properties.

Misinterpretation by the Commission and Appellate Court of the Relief Asked for by the Company.

It would appear that the Commission and the Appellate Court were, at this point of their argument, controlled by the impression that the Company was asking the Commission to give to it some affirmative aid, at the expense of the public, in order that the Company might overcome the adverse conditions which confronted it. Of course, this is not what the Company had asked for. All that it sought was that it should not be restrained from taking a step which was required in order that those conditions might be successfully met,—namely, raising its fares to a point that would yield to it a reasonable return upon its property.

The learned Judge who delivered the Opinion of the Appellate Court supposed the case of a corporation engaged in the manufacture of ice; and supposed (for the argument's sake) that such business was under Commission control. He then asked whether, facing the loss of custom due to modern methods of domestic refrigeration, such company could look to the Commission for salvation. There was here a double confusion,—which the Commission also shared. In the first place, the appellant was merely asking the Commission for the *opportunity* to exercise its constitutional right; and not for any guaranty that such exercise would "earn a sufficient return"; or for "protection". And, in the second place, if the supposed ice company were required by the Commission to manufacture a given quantity daily (to melt if not bought) then the supposed case would have an element of appositeness.

The Commission suggests (as a possibility rather than as a fact) that a car-fare, based on a reasonable rate of return, may exceed the "value of the service" to the user. The majority Opinion of the Appellate Court below noticed the possibility; but, strangely enough, after intimating that the fact is so incapable of proof as to be "*in nubibus*",—in-

timated that, on such a point, the views of the Commission should be controlling. Judge Adkins, concurring, was careful to say that, as he understood the Opinion, "It was not intended * * * to suggest that there is anything in the record to indicate that a ten cent fare would be more than the service is worth, if such a fare should be found necessary to pay for the cost of the service and give to the company a fair return on the value of its property." (R., 1654, 155 Md. 608.)

Both the Commission and the Appellate Court cite *Covington & L. Turnpike Road Co. v. Sandford* (164 U. S. 578) decided in 1896. This case arose before the era of valuations; the Turnpike Company was insisting on rates sufficient to pay dividends; and this Court aptly cited the common-law principle that public servants must give reasonable service at reasonable rates. The case is, then, authority for the proposition that a public utility has not a constitutionally guaranteed right to levy charges that will enable it to pay dividends upon its stock irrespective of whether or not its capitalization has a due relation to the fair value of its properties, or whether the Company is efficiently organized and efficiently and economically operated. As to this, this Court rightly said:

> "The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." *Covington & L. Turnpike Road Co. v. Sanford, supra,* at 597.

The case is also authority for the doctrine, so obvious as scarcely to need declaration, that, though a public utility is constitutionally entitled to earn, if it can, a reasonable return upon the fair value of its properties devoted to the public use, there exists no guarantee of any sort, legal or otherwise, that a given public utility will, in fact, be a profitable one to its owners. As this Court said:

> "If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the

public." *Covington & L. Turnpike Road Co. v. Sandford, supra,* at 597.

If a case is conceivable where a non-confiscatory charge for a necessary service would exceed its value, then the public's constitutional remedy is condemnation. The question is, however, academic, for neither Court nor Commission in the instant case held (or could hold) that a base fare of 10 cents would exceed the value of the permissible rides (city plus suburban) furnished by the appellant. Nor, so far as the writer has been able to discover, has a rate, confiscatory as regards the utility, ever been judicially upheld on the ground that a higher rate would be too burdensome to the public using, and demanding the use of, the utility's property.

The assertion that a charge of ten cents for a ride, which the Company had asked permission to make, would be more than the transportation would be worth, the Company has also met by showing that the service now supplied to the people of Baltimore is as well worth ten cents as was the street car service worth five cents a generation ago when that fare was universally deemed to be a reasonable one to the public. The Company has shown that, in the labor and materials that produce a ride, the intrinsic purchasing value of a ten cent piece is no greater than was a five cent piece twenty years ago.

And, still further, the Company can point to the fact that in quantity and quality the rider gets more for the fare than he did before. Evidence in support of such statements of the Company appears in the Record in this case. Indeed, we find the Public Service Commission of Maryland, in its opinion of February 10, 1928, itself saying:

> "In fact, taking all things into consideration, including the cost of giving the service, the extension of lines and fare zones, the greater transfer privileges, the auxiliary bus lines and the like, the Commission believes that street car riders as a whole today receive relatively much more for the fare they pay than they ever received for a five cent fare." (R. 23.)

If then we combine the concededly greater service which is today suplied by the Company with the decreased value of money, it is clear that a present ten cent fare is a reasonable one to the public.

Conditions Peculiar to Baltimore.

It needs to be stated that there are reasons, peculiar to the City of Baltimore, why fares in that city might well be expected to be higher than in other cities of the United States.

The United Railways & Electric Company of Baltimore is one of the most heavily taxed street railways in the United States. In addition to all of the common varieties of public charges (*e. g.*, real and personal taxes, licenses, paving, repairing, snow-removing and street sprinkling) there is an unique "Park Tax" of 9% on *gross* receipts within the City limits,—now greatly expanded by annexation since Commission control.

As regards the Park Tax of 9% of gross, the Public Service Commission of Maryland in its opinion of February, 1928, said:

> "An element in the street railway situation in Baltimore which results in higher rates of fare, and which does not obtain, so far as this Commission is aware, in other cities, is the Park Tax. This matter is better understood now by the car riding public than it was some years ago. It is purely and simply a tax on the street car riders for the support of the city parks. The Company does not pay it. It is paid by the riders and the Company simply acts as collector, receiving approximately one-half cent on each fare the rider pays and turning the money over to the City quarterly. It was, perhaps a tax on the Company in former years, but now it is an expense which must be deducted before any rate of return is calculated. The result is that the parks are maintained, stadium and swimming pools built, tennis courts, golf courses, baseball fields and the like established, and park roads maintained for automobilists, at the expense of the street car rider in-

stead of the general public. The street car riders have contributed for these purposes, since 1910, when the Company was put under Public Service Commission regulation, the sum of $15,406,794.00. This, of course, in addition to the general taxes and such special charges as those made for street paving and for maintaining the paving between the tracks and for two feet on each side, which are also paid by the street car riders." (R,. 28-29.)

But this is not all. The City, in 1918, tripled its area by annexation of surrounding territory. Single fare zones were extended, and finally, following an order of the Commission, all second fare zones within this greatly enlarged area were abolished. The evidence shows that the lengthened rides and the abolished second fares have reduced the Company's former receipts by more than $500,000 annually. To which extent also the fare increases have been illusory. (R. 21; Company's Exhibit No. 13; R. 1409-1411).

Other misconceptions of the Commission, incorporated (but not made factors) in the majority opinion of the Appellate Court below,—represent two aspects of the same thing. Lists were given of numerous localities where the street railway company was receiving less than the normal rate of return; and less than a base fare of 10 cents. For this, there are doubtless local explanations; the fact is that many street railway companies also operate prosperous electric light and power plants. Certain it is that base fares are increasing all over the country; and, beyond any doubt, no unbiased mind can see anything unnatural in a base fare of 10 cents in Baltimore today. Certain it is that neither Court nor Commission has found that it would exceed the worth of the ride. The 9% park tax at once reduces any increase that may be given and the reduced purchasing power of the nickel in combination with the extension of lines and fare zones easily shows that the Appellant stands on fair ground. But, apart from all this, it seems strange to argue that because street railway companies in other

localities *may* be submitting to confiscation, therefore, the Appellant should not complain.

Equally irrelevant is the suggestion that the Appellant's troubles are due to its capital structure.

It is said by the Commission and noticed by the Appellate Court below that the Appellant's bonded debt is heavy in comparison with its capital stock. The Court of Appeals fell into error in determining the Company's ratio of bonded debt to capitalization on the basis of customary comparison,—for it included in the bonded debt $14,000,000 of Income bonds which, for purposes of comparison, are substantially preferred stock (for which indeed they were exchanged). While a lien, these bonds have no fixed due date; they are callable at the Company's option in and after 1949, and the interest (though cumulative) is payable only if and when earned. The great bulk of the Company's bonded debt bears interest at the rate of 4% per annum. Surely it is a confusion of causes to suggest that this not abnormal financial structure is responsible for a credit situation which is quite in line with the experience of street railways generally. Furthermore, whether a Company buys its property through the use of stock or bonds, or both, has no bearing on the fairness of the return for the public's use of that property.

CONCLUSION.

It will have sufficiently appeared from what has been said that the present case is one of importance, because the interest of the community is, in every real sense, identical with that of the Company. Already the streets of down-town Baltimore are congested to such an extent that an attempt to transfer to private automobiles or even to busses the passengers now carried on the street cars would render the traffic situation an impossible one. In the Opinion of the Maryland Public Service Commission we find it declared:

"That the service rendered by the Company is a necessary and vital service to the people of Baltimore, is indicated by the fact that the demand upon the system during morning and evening rush hours is almost greater than the Company can meet. * * * The motor car has largely taken the place of the street car for pleasure riding. The street cars are used only by those who find them necessary or convenient to get to and from places of employment, or for other trips about the city. The service to the people for such trips is almost indispensable. It would be practically impossible for all the people who use the street cars to reach their places of business or employment and return to their homes, by any other means of transportation now available." (R. 22.)

In the able Opinion of Judge Ulman, rendered in the Court of first instance, it is said:

"This evidence, which is not disputed, shows that at the hours of peak load, the Company carries more passengers now than it ever did. Hence it is obvious that the competition of the private automobile, of which so much has been said in the briefs and in argument, has *modified* the need for public transportation in Baltimore, but has not shown a tendency to supplant it. This modification results in an increased cost of service. Necessity of service is as great as it ever was." (R. 74-75.)

In order that this indispensable public service may be rendered in the form and to the extent to which it should be rendered, it is necessary, as has been earlier said, not only that the private capital already invested should be permitted by law to earn, or at least to endeavor to earn, a fair net return thereupon, but that the street car companies should be enabled to show earnings which will make it possible for them to attract, at reasonable rates, addi-

tional capital in order that necessary additions to service may be provided.

It is to be regretted, although it is not perhaps a matter for surprise, that the public, or even public service commissions, have not always recognized that where, by drastic regulations, the public utility is hampered in getting new money, the interests of the public will suffer. As Judge Parke, of the Maryland Court of Appeals said, when passing upon the attitude of the Commission in this case:

> "A failure to grant such relief invites disaster; and stinted relief often simply delays a crisis which, when it arrives, will prove immediately disastrous to the owners of the utility and, in the end, to the interests of the public." (R. 1657-1658; 155 Md. 610-611.)

In an address before the American Economic Association last year, the eminent authority, Dr. Arthur T. Hadley, President Emeritus of Yale University, gave as his opinion that public service companies need to be permitted to earn at least ten per cent. upon the fair value of the properties, if they are to be enabled to give satisfactory service to the public—that a denial to them of the possibility of earning such a return is, apart from any question of constitutionality, inexpedient as regards the public. He said:

> "Unless the return allowed by the public service commission to successful companies is so high as to compensate for the risks of industrial progress—say 10 per cent. at least—it discourages the investment of new capital. * * * Every first rate authority from Farrer down, I believe, agrees that limiting profits, as a means for lowering rates, defeats its own ends." (American Economic Review, March, 1928.)

As to the broader interest of the American public, that the legitimate rights of property shall not be invaded, there may be quoted the words of Mr. Justice Moody, who, speak-

ing for a unanimous Court in *Knoxville v. Knoxville Water Company*, 212 U. S. 1, said:

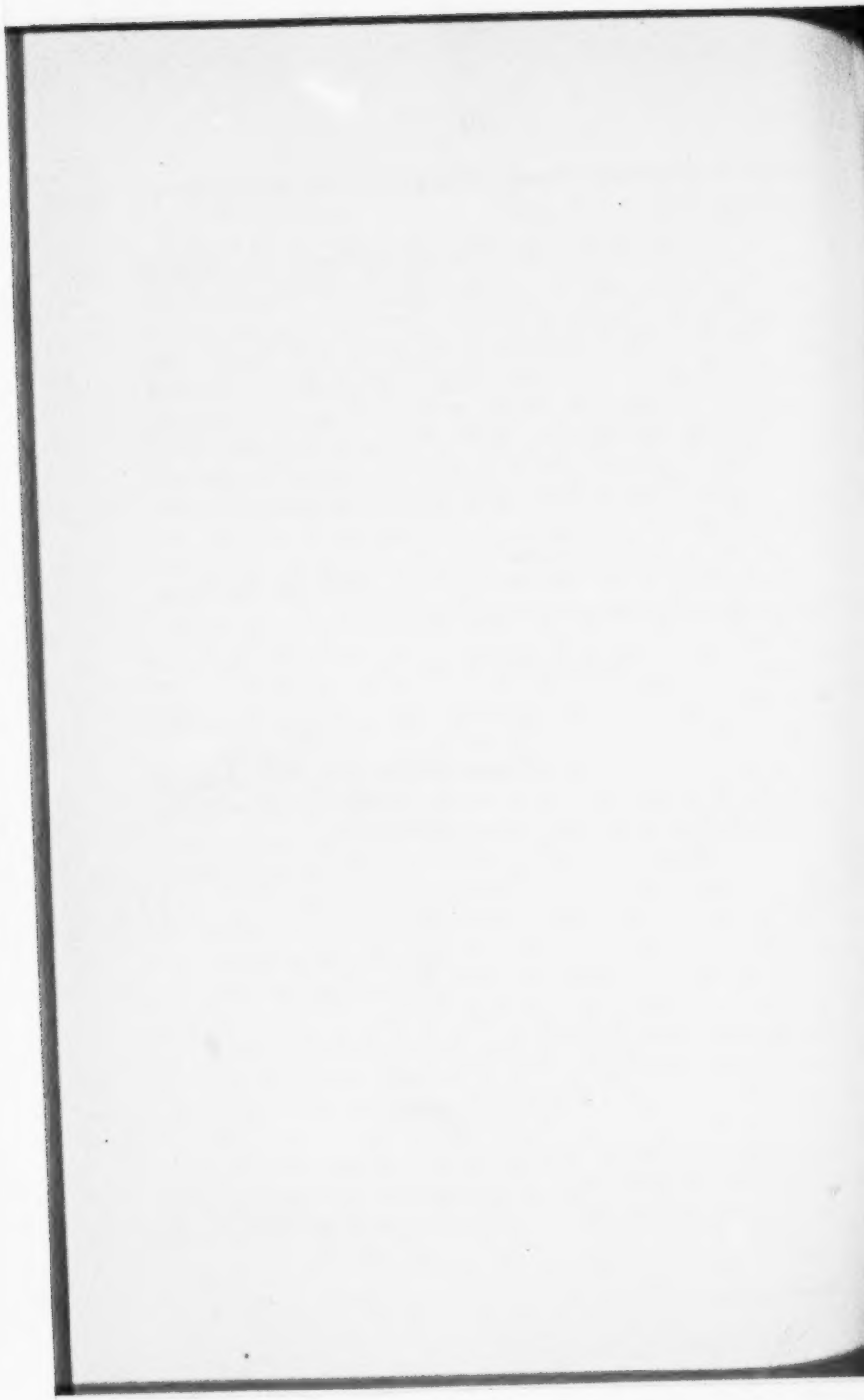
> "Our social system rests largely upon the sanctity of private property; and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, unsettling values and destroying confidence."

The decree of the Appellate Court below on the Company's appeal in No. 55 should be reversed.

Respectfully submitted,

W. W. WILLOUGHBY,

Of Counsel for the United Railways and Electric Company of Baltimore.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 55.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, *Appellant,*

versus

HAROLD E. WEST, CHAIRMAN, J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, *Appellees.*

No. 64.

HAROLD E. WEST, CHAIRMAN, J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, *Cross-Appellants and Petitioners,*

versus

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,

Cross-Appellee and Respondent.

CROSS-APPEAL FROM AND WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR THE PUBLIC SERVICE COMMISSION OF MARYLAND, APPELLEES AND CROSS-APPELLANTS AND PETITIONERS.

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TEXTBOOKS AND ENCYCLOPEDIAS CITED.

Hayes, Public Utilities, Their Fair Present Value and Return, 33. 55
Lawrence, Cost Accounting, (1926), 308 47
Lyndon, Rate Making For Public Utilities, 17 55
Md. P. S. C. Rep. No. 10, 39 109
1 Montgomery, Auditing Theory and Practice, (1921), 634 46
Powelson, Introductory Accounting, 398-405 46
Spurr, Guiding Principles of Regulation, Vol. 3, p. 530 ..... 101, 131
Whitten-Wilcox, Valuation of Public Service Corporations, 2 Ed., 1928, Vol. 2, p. 1829 48

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In The

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 55.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE, *Appellant*,

versus

HAROLD E. WEST, Chairman, J. FRANK HARPER and STEUART PURCELL, Members, Constituting the PUBLIC SERVICE COMMISSION OF MARYLAND, *Appellees*.

No. 64.

HAROLD E. WEST, Chairman, J. FRANK HARPER and STEUART PURCELL, Members, Constituting the PUBLIC SERVICE COMMISSION OF MARYLAND, *Cross-Appellants and Petitioners*,

versus

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,
Cross-Appellee and Respondent.

Cross-Appeal from and Writ of Certiorari to the Court of Appeals of the State of Maryland.

BRIEF FOR THE PUBLIC SERVICE COMMISSION OF MARYLAND, APPELLEES AND CROSS-APPELLANTS AND PETITIONERS.

Statement of the Case.

The Appellant will be herein referred to as the "Company." The Appellees (who are also cross-appellants and petitioners and constitute the Public Service Commission of Maryland) will be referred to as the "Commission."

The opinion of the Court of Appeals of Maryland has not yet been officially reported, but see *United Railways and Electric Company vs. West, et al.*, 145 Atl. 340 (Record 1712-1716). See also opinion on first appeal to the Court of Appeals of Maryland, reported in *Public Service Commission vs. United Railways and Electric Company of Baltimore*, 155 Md. 572 (R. 1622-1659).

The appellant Company asks this Court to reverse a decree of the Court of Appeals of Maryland which upheld the validity of an order of the appellee Commission fixing the rate of fare to be charged by the Company and abolishing the second fare on its Halethorpe line on the ground that the same is confiscatory. The Commission asks review, by way of cross-appeal and/or writ of certiorari, of the decision of the Court of Appeals of Maryland holding that the Company's annual depreciation allowance must, as a matter of law, be based on the *present value* instead of on the *cost* of the Company's depreciable property.

The Commission contends that even if this Court is without jurisdiction to entertain either its cross-appeal or its petition for certiorari, nevertheless, since the issue of confiscation is involved, this Court will examine the whole record to see whether *in fact* this charge is well founded.

The Company claimed before the Commission and before the Court of Appeals and now claims (1) the right to *increase* its fare to a flat 10 cent fare for adults, a 6 cent fare for children between the ages of four and six years, school tickets at 5 cents each and commutation tickets at special rates; (2) the right to charge a second fare on its Halethorpe line instead of the single fare ordered by the Commission, and (3) an annual depreciation allowance based on the *present value* instead of on the *cost* of its depreciable property.

The Court of Appeals upheld the order of the Commission which (1) *increased* the Company's base rate of fare to 10 cents cash or 8¾ cents when tokens or fare checks are purchased (i. e., four checks for 35 cents), and continued the existing rate of fare for children and for school tickets at 5 cents; (2) abolished the second fare on its Halethorpe line; and (3) decided as a matter of law that the Company's annual depreciation allowance must be based on *present value* and not on *cost*.

The value of the Company's property was fixed by the Commission in accordance with the Maryland law. The effect of this will be commented on at length hereafter. The figure thus found by the Commission was $75,000,000, and on this basis the decision below as to fares and depreciation results in a predicted return to the Company of 6.26 per cent. The Company contends that this rate of return is confiscatory and that any rate of fare which does not give it the opportunity to earn 8 per cent. on the rate base of $75,000,000 is confiscatory.

Originally the Company claimed an annual depreciation allowance, based on value, of $2,200,000. The Commission originally found that a fair allowance for depreciation based on cost would be $883,544. Thereafter as

a result of the decision of the Court of Appeals in the first appeal in this case the Commission found, as it was compelled to do by that decision, that a reasonable allowance on the basis of value was $1,638,660. The Company did not contest, but has accepted, this figure. If the Court of Appeals was wrong in requiring the Commission to base this allowance on value instead of on cost, its action was tantamount to allowing the Company to collect, under the guise of costs, a sum exceeding its real costs by the difference between $1,638,660 and $883,544, or $755,115 by means of the rate of fare fixed by the Commission.

If the fare fixed by the Commission should remain unchanged but the depreciation allowance were changed (as we contend it should be) from the value to the cost basis, the return to the Company would be increased from 6.26 per cent. to 7.155 per cent. If, on the other hand, the claims of the Company were allowed and the number of revenue passengers equaled its predictions, the return would be 8.053 per cent. (See Schedule B at page 145 of Appendix to this Brief.)

Six successive increases in fare have been allowed the Company by the Commission in the period from January 7, 1919, to November 28, 1928, i. e., its base rate of fare has been increased from 5 cents flat, to the present rate of 10 cents flat, 8¾ cents token fare. From 1900 to 1920 the revenue passengers carried by the Company steadily *increased* with the increasing population growth. From 1920 to 1926, though the population steadily increased, the Company's revenue passengers *decreased* 11.29 per cent. The Company has no competition from any other street railway company and it is protected against competition by motor bus lines ("jitneys") though it ope-

rates several such lines itself. The main factor in this loss of revenue passengers referred to is concededly due to the competition of the private automobile. If the rates of fare fixed by the Commission in this case were applied to the volume of the business done by this Company nine years ago, the revenues of the Company would be more than sufficient to yield it the return demanded in this case.

A special problem was thus presented to the Commission, i. e., what was a just and reasonable fare to the Company when loss of revenue was due to increasing loss of patronage.

History of the Case.

The present proceedings were initiated August 1, 1927, when the Company filed with the Commission its application for an increase in rates from 8 cents cash, with two tokens for 15 cents, to a straight 10 cent rate. It asked for both emergency and permanent relief, mentioning, among other things, the growth of the use of the automobile (R. 89-98). The Commission first heard the application for emergency relief, the hearings beginning on September 6th, and ending on September 14, 1927. Having denied the emergency relief asked for, the hearing of the petition for a permanent increase in fare began on October 27, 1927, and the case was submitted to the Commission on the 10th of December, 1927. The citizens of the suburban communities of Halethorpe, Arbutus and Leeds became parties by intervention alleging discrimination in rates against these communities because the length of the street car ride to the center of the city for which they were charged two fares was less than car riders of other communities received for one fare.

In the proceedings before the Commission a State official, designated by law as the People's Counsel, introduced evidence and conducted the case on behalf of the public.

On February 10, 1928, the Commission delivered an elaborate opinion and passed an order denying the full relief asked by the Company but *increasing* the base rate of fare from 8 cents cash, with two tokens for 15 cents, to 9 cents cash or 8⅓ cents, when tokens or tickets are purchased (three for 25 cents). The Commission also made an allowance for annual depreciation of 5 per cent of the Company's gross revenue, the estimate being that $883,544 would be thus provided for the year 1928. Though this allowance, following the practice of the Company since 1912 when it first established an annual depreciation allowance, was fixed at a percentage of the gross revenue, it was concededly designed to produce an annual sum sufficient to provide for necessary retirements of property at their *cost*. By its order the Commission abolished the second fare on the Halethorpe line. The Commission estimated that for the year 1928 the Company would carry in round figures 215,000,000 revenue passengers, would earn a net income of $1,415,606, and would have available for return the sum of $4,731,606, equivalent to a return of 6.26 per cent. (See opinion and order of Commission, R. 14-59; see also Commission's estimate for the year 1928, R. 56.)

On March 13, 1928, the Company filed its bill of complaint in the Circuit Court No. 2 of Baltimore City, seeking to vacate and enjoin this order of the Commission (R. 5-13). The bill alleged that the order was confiscatory under the Fourteenth Amendment of the Constitution of the United States because (1) the fares fixed would yield a return of not more than 6.26 per cent., (2)

the annual allowance for depreciation was inadequate by the sum of $1,316,456 (the difference between $2,200,000, claimed by the Company, and $883,544, allowed by the Commission) and was fixed on an unlawful basis, i. e., on *cost* instead of on *value,* and (3) that the abolishment of the Company's second fare on its Halethorpe line was confiscatory.

In accordance with the Maryland law a duly certified transcript of all papers and proceedings, including evidence in the case before the Commission, was returned to the Circuit Court No. 2 of Baltimore City and was there in evidence, and, the Company not having availed itself of its statutory right to introduce before the Court additional evidence, this transcript furnished the basis for the Court's decision. (Bagby's Annotated Code of Maryland, Vol. 1, Art. 23, Sections 404, 405, 406.)

On May 11, 1928, the Circuit Court No. 2 of Baltimore City entered a final decree sustaining all of the contentions of the Company with the exception of that as to the Halethorpe line and enjoining the Commission from enforcing its order. This decree was accompanied by an opinion of Judge Ulman (R. 65-84) wherein it was held (1) that rates of fare yielding a 6.26 per cent. return were confiscatory and that any rate of fare producing a rate of return lower than 7½ per cent. on value was unreasonably low and confiscatory; (2) that the depreciation allowance should have been based on *value* instead of *cost,* and (3) that the Commission's action as to Halethorpe was lawful.

From this decree the Commission appealed to the Court of Appeals of Maryland, the highest court in the State, and the Company took a cross-appeal (R. 87-88). The questions thereby raised by the Commission were

(1) whether the lower court was right in holding that the rates of fare fixed by the Commission resulted in an insufficient rate of return to the Company, (2) whether the lower court was right in requiring the annual depreciation allowance to be based on value rather than on cost. The question raised by the Company's cross-appeal was whether the lower court was right in sustaining the Commission's order abolishing the second fare zone on the Company's Halethorpe line.

On July 16, 1928, the Court of Appeals reversed in part and affirmed in part the decree of the Circuit Court No. 2 of Baltimore City and remanded the case (through the Circuit Court No. 2 of Baltimore City) to the Commission for further proceedings in accordance with the opinion of the Court of Appeals (R. 1622). The Court of Appeals held (1) that the rate of return of 6.26 per cent. on the value of the Company's property was neither confiscatory nor unreasonable as a matter of law (R. 1647) and that, therefore, the decree of the lower court vacating the order of the Commission fixing the schedule of fares to be charged by the Company and enjoining the Commission's order in that respect was erroneous, (2) that the lower court was right in holding that the annual depreciation allowance should have been based on value and not on cost, but that that part of the decree should neither be affirmed nor reversed but that the case should be remanded in order that the Commission might further consider the question of depreciation, and "make any changes in the rate schedule which may be necessary and requisite to yield to the Company a fair and reasonable return upon the fair value of its property," and (3) that that part of the decree which affirmed the order of the Commission extending the first fare zone of the Halethorpe line to the terminus thereof should be affirmed.

Public Service Commission v. United Railways and Electric Company, 155 Md. 572. (For this opinion of the Court see R. 1622-1653; concurring opinion R. 1653-1654; dissenting opinion by Chief Judge Bond, R. 1655; dissenting opinion by Judge Parke, R. 1656-1659.)

From this decree of the Court of Appeals the Company appealed to this Court. The Commission filed a cross-appeal and also a petition for certiorari. On November 19, 1928, both appeals were dismissed for lack of jurisdiction on the ground that this decree of the Court of Appeals was not final, and the application for certiorari was denied on the same ground (278 U. S. 567).

Meanwhile, and pending action by this Court on the Company's appeal and the Commission's cross-appeal and petition for certiorari, the Circuit Court No. 2 of Baltimore City, pursuant to the mandate of the Court of Appeals, on August 31, 1928 (R. 1680-1681), entered its decree refusing the injunction prayed by the Company and refusing to vacate and set aside the order of the Commission fixing the Company's rates of fare. The decree, however, remanded the proceedings to the Public Service Commission "with directions to further consider the question of depreciation, determine the proper allowance for depreciation in accordance with the opinion of the Court of Appeals and make any change in said rate schedule which may be necessary and requisite to yield to the plaintiff a fair and reasonable return (in accordance with said opinion) upon the fair value of its property."

Pursuant to this direction, the Commission entered upon a rehearing of the proceedings in so far as they concerned the annual allowance for depreciation, heard additional evidence and on November 28, 1928, filed an

opinion and passed an order finding that the proper annual amount to be allowed for depreciation, based on value was $1,638,660 (instead of $883,544 which was the amount previously found by the Commission on the basis of cost). The Commission further found that this increase in the depreciation allowance necessitated a further increase in the rate of fare from 9 cents cash or three tokens for 25 cents, to 10 cents cash or four tokens for 35 cents,—the now existing fare (R. 1685; see also opinion of the Commission on rehearing and order of the Commission, R. 1691-1697).

Thereupon the Company on the 12th day of December, 1928, filed its supplemental bill of complaint in the Circuit Court No. 2 of Baltimore City against the Commission. In this bill it did not question the new and increased depreciation allowance made by the Commission, but it did seek to vacate and enjoin the order of the Commission on the ground that the same was confiscatory under the Fourteenth Amendment because (1) the fares fixed would yield a return of no more than 6.26 per cent. and (2) because of the abolishment of the Company's second fare on its Halethorpe line (R. 1681-1690).

On January 10, 1929, the Circuit Court No. 2 of Baltimore City dismissed the Company's supplemental bill and on the same day the Company appealed from this decree to the Court of Appeals of Maryland. On March 20, 1929, the Court of Appeals affirmed the decree of the Circuit Court No. 2 of Baltimore City dismissing the Company's supplemental bill (R. 1716-1717). *United Railways and Electric Co. v. West, et al., constituting the Public Service Commission of Maryland,* 145 Atl. 340. For opinion of the Court of Appeals see R. 1712-1716.

From this decree of the Court of Appeals the Company again appealed to this Court (R. 1717-1718). The Commission likewise again filed a cross-appeal and a petition for certiorari as a motion in the case (R. 1727-1732).

Assignments of Error on Commission's Cross-Appeal

The errors assigned by the Commission on its cross-appeal are as follows (R. 1732-1733):

"1. That the Court of Appeals erred in not reversing the decree of the Circuit Court No. 2 of Baltimore City, dated May 10, 1928, insofar as said decree adjudged and decreed that the annual depreciation allowance of The United Railways and Electric Company of Baltimore, fixed by Order No. 12,639, of the Public Service Commission of Maryland, passed on February 10, 1928, should be calculated to restore to the said Company the present value of its depreciable property, and that calculating said allowance so as to restore to the Company the cost of its depreciable property, (as was done by the said Commission in the said Order), was confiscatory, and deprived the Company of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

2. That the Court of Appeals of Maryland erred in holding in its Opinion and Decree dated July 16, 1928, made final by its decree entered March 20, 1929, that the annual depreciation allowance of The United Railways and Electric Company of Baltimore, fixed by the Order No. 12,639 of the Public Service Commission of Maryland, passed on February 10, 1928, so as to restore to the Company the cost of its depreciable property, and not the present value thereof, was confiscatory, and deprived the Company of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States."

Outline of Facts in Evidence Before the Commission.

The record contains a reasonably full history of the Company and its operations from the date of its organization by consolidation in 1899 to the date of the hearings in this case. The opinions of the Commission (though not the evidence) in four prior rate cases and the opinion of the Commission (though not the evidence) in the proceedings taken by the Commission in valuing the property of the Company (the "Valuation Case") were offered in evidence before the Commission in the case at bar. (For opinions in prior rate cases see Record as follows: R. 115-148; R. 153-215; R. 220-231; R. 234-243; R. 249-268; R. 269-273. For opinions in "Valuation Case" see R. 279-308; R. 313-334; R. 338-357.) The evidence just referred to was supplementary to the oral testimony taken before the Commission in the case at bar (R. 361-1247) and the exhibits then offered (R. 1348-1614). The two opinions of the Public Service Commission in the case at bar will be found at R. 14-57 and 1691-1695. The opinions of the Court of Appeals of Maryland on the first appeal, both majority and dissenting, will be found at R. 1622-1653; 1653-1654; 1655; 1656-1659, and on the second appeal at R. 1712-1716.

From these sources the following outline of facts in evidence before the Commission is taken.

The present Company was organized on March 4, 1899, by the consolidation of a number of competing street railways serving the City of Baltimore and its suburbs. Its authorized capitalization as of that date was as follows:

1st Consol. Mort. 4% gold bonds	$38,000,000
4% Cumulative preferred stock	14,000,000
Common stock	24,000,000
Total	$76,000,000

Shortly after the consolidation the Company authorized the issue of $14,000,000 of income bonds with which to retire the preferred stock originally authorized.

At the time of the consolidation or shortly thereafter it would seem that all of the first consolidated mortgage bonds and the income bonds, aggregating $52,000,000, were outstanding. It is not clear how much of the common stock was then issued (R. 122-123).

After the Baltimore fire of February, 1904, interest on the income bonds was passed for the purpose of securing funds for track reconstruction and repair and improvements to power houses, etc. In 1906 an agreement was entered into with the holders of such income bonds under which the holders of substantially the entire amount thereof agreed to accept the interest due them from 1904 to 1910 in the shape of 5 per cent. thirty year income funding bonds which were accordingly issued in the amount of $3,920,000. In 1906 it was found that new capital was necessary for terminal stations, car houses, extensions, etc. The existing property, being already heavily encumbered by the outstanding first consolidated 4% bonds and the underlying bonds of certain of the constituent companies, it was necessary to seek some new source of capital. Accordingly the Maryland Electric Railways Company was formed as a subsidiary of the present Company and authorized an issue of $8,000,000 first mortgage 5% twenty-five year bonds. The property thus acquired was leased to the United Company at a rental of 6% on cost thereof and certain additional payments to be made by the United Company (R. 124-125).

In the "Valuation Case" the Commission found it impossible to ascertain the original cost of the property. In that case the Company claimed that this original cost in 1899 was at least $42,000,000. It thus appears that

on the Company's figures the estimated original cost of the property was less by $10,000,000 than its then outstanding funded debt (R. 299).

The record does not show the market value of the Company's securities as of 1927 or 1928. As of January 1, 1924, the outstanding securities at their par value were as follows (R. 298-299):

Stock (par $50 a share)		$20,461,200
Bonds:		
Income	$14,000,000	
Mortgage	51,366,000	
Total of Bonds		$65,366,000
Total par value of securities		$85,827,200

At the same time the market value of these securities indicated by stock market quotations was as follows:

Stock (par $50 a share)		$6,956,808
Bonds:		
Income	$7,210,000	
Mortgage	42,463,010	
Market value of bonds		49,673,010
Total market value of securities		$56,629,818

As of August 31, 1927, there was relatively little change in the capital structure of the Company. On that day it stood as follows (People's Counsel Exhibit No. 52, Sheet 1, R. 1595):

Funded Debt:		
Mortgage Bonds	$46,806,500	
Income Bonds	13,977,000	
Miscellaneous obligations	6,392,700	
Total Funded Debt		$67,176,200
Capital Stock (Par $50 a share)		20,461,200
Total		$87,637,400

The total value of the Company's property as found by the Commission is $75,000,000. The defects in the capital structure of the Company as thus shown and their bearing on the credit position of the Company were the subject of comment in the opinion of the Commission (R. 25-28) and in that of the Court of Appeals (R. 1631-1632; 1640-1641).

The Valuation Case.

The valuation proceedings were begun in 1912 but for various reasons were allowed to lie dormant until early in the year 1925. In accordance with the practice in Maryland the People's Counsel represented the public and had at his disposal both the regular engineering and accounting staff of the Commission and a specially retained consulting engineer. After hearings lasting thirty-one days and three days of argument the Commission on March 9, 1926, rendered its opinion finding the value of the property (excluding "easements") as of January 1, 1924, to be $70,100,645. Though this figure was much less than that claimed by the Company, it did not take an appeal. However, the question having arisen as to whether the right of the Company to operate over the streets of the City of Baltimore (its "easements") constituted property which should be included in the rate base, a majority of the Commission decided in the affirmative (R. 304-307). One of the three members dissented (R. 313-334). This question was taken to the Court of Appeals of Maryland which held that the easements were property and should be included in the rate base, but further held that the Commission in arriving at its estimate of value had done so on erroneous legal principles and remanded the case to the Commission for consideration of the question of value in accordance with the rules laid down by the Court. *Miles v. P. S. C. of Md.*, 151 Md.

337. Thereupon the Commission reconsidered this matter and on February 1, 1928, rendered an opinion and passed an order assigning to the easements a value of $5,000,000 (R. 338-357).

It thus appears that this valuation in its inception long antedated the institution of the present fare case. However, in the present case the Commission, bringing its findings of value as of January 1, 1924, down to date, included the easements and fixed value as of the date of the conclusion of the rate case, February 10, 1928, at $75,000,000 (R. 48-49).

Operations.

Using in all cases round figures, the revenue passengers of the Company *increased* from 89,000,000 in 1900 to 253,000,000 in 1920, the estimated population served having increased from 500,000 to 800,000 during the same period. From 1920 to 1926 the revenue passengers *decreased* from 253,000,000 to 225,000,000, a net decrease of 11.29 per cent.; the estimated population having *increased* during the same period from 800,000 to 843,000. Automobile licenses issued in Maryland increased from 100,000 in 1920 to 267,000 in 1926 (Company Exhibit 11, R. 1406; Company Exhibit 2 A, R. 1389).

The return earned by the Company on the valuation figure of $75,000,000 adjusted for the years in question was as follows (See Appendix to this Brief, Schedule C, page 147):

For the calendar year	1920	5.579%
	1921	4.987%
	1922	5.331%
	1923	5.469%
	1924	5.469%
	1925	5.631%
	1926	5.671%

Including the present case, this is the fifth case in which the Commission has increased the rates of fare of the Company during the period January 7, 1919-November 28, 1928. These figures were as follows:

Jan. 7, 1919	6c flat,
Sept. 30, 1919	7c flat, 6½c token fare,
Dec. 21, 1919	7c flat,
May 26, 1924	8c flat, 7½c token fare,
Feb. 10, 1928	9c flat, 8⅓c token fare,
Nov. 28, 1928	10c flat, 8¾c token fare,

The Company paid no dividends on its stock prior to 1912. In that year it paid $225,000. From 1913 to 1918, inclusive, it paid an average annual dividend of slightly over $818,448; in 1919 it paid $204,612; in 1920 and 1921 the dividend was passed; in 1922 it paid $409,224 and thereafter to and including 1926 it paid $818,448 (People's Counsel Exhibit No. 7, R. 1476).

The Commission estimated that in 1928 the Company would carry 215,397,270 revenue passengers, being a 2% decrease from 1927 (R. 56). The Company, taking the actual number of revenue passengers for nine months in 1927 and estimating the number for the remaining three months, fixed the figure for that year at 219,466,896. It computed the passenger revenue under the 10 cent fare claimed by it on the revenue passengers thus estimated for 1927 with a 5% reduction for the total revenue so determined, thus reflecting its estimate of a 5% reduction in revenue passengers for the year 1928 (Company's Exhibit 24, R. 1428). The following table shows the contrast between the Commission's and the Company's estimates of net income and per cent. of return based on their respective estimates of passengers. (For tables see Appendix to this Brief, Schedule B, page 145).

	Commission		Company	
	Estimated Return at 10c or 4 Tokens for 35c, with depreciation based upon "Value."	Estimated Return at 10c or 4 Tokens for 35c, with depreciation at 5% of Operating Revenue.	Estimated Return at 10c Straight Fare with Depreciation based upon "Value" as determined by Commission. Other figures taken from Company Ex. 24 (R. 1423).	Estimated Return at 10c Straight Fare with Depreciation based upon 5% of Revenue. Other figures taken from Company Ex. 24 (R. 1423).
Gross income	$4,869,521	$5,537,238	$6,211,220	$6,798,636
Net income	1,424,521	2,092,238	2,766,220	3,353,636
Per cent. of return, base of $75,000,000	6.26%	7.155%	8.053%	8.836%

ARGUMENT.

Summary of Argument.

I.

The burden is on the Company to show that the action of the Commission, upheld by the Court of Appeals, its *final result and as a reality* is necessarily confiscatory of its property under the rules of federal law. To succeed it must present a record here which shows that the rate of return, when applied to a rate base arrived at in accordance with federal law, would be confiscatory. Under the rules sanctioned by this Court in confiscation cases, a value much lower than that found by the Commission under Maryland law would have resulted. It is our contention, therefore, that though the Commission established the value it did in accordance with Maryland law, it did so without giving consideration to the loss of value resulting from loss of traffic due to automobile competition, but did consider and give effect to this

factor when fixing the rate of return. In this Court, therefore, the Company must show, but has failed to show, that the result of this action by the Commission necessarily results in the confiscation of its property. The Company cannot have at one and the same time state law as to value and federal law as to rate of return. This Court should therefore affirm the decree on the Company's appeal, even though it may consider a rate of return of 6.26 per cent. too low, because this record on the one hand discloses that the actual return permitted the Company would constitute a much higher percentage of a rate base arrived at by the application of federal rules, and on the other hand does not negative the presumption that so regarded it would constitute so high a percentage of a federal rate base as to meet this Court's approval.

II.

The Commission was compelled by the ruling of the Court of Appeals in this case to fix the depreciation allowance on value instead of on cost. We contend that this view of the Court of Appeals is erronous and contrary to the doctrine of this Court and that consequently the Company is now permitted, under the rates of fare fixed by the Commission, to collect an annual sum for depreciation much in excess of that required to make good the depreciation in fact suffered by it. It is our contention, therefore, that on an issue of confiscation the legal validity of this action of the Court of Appeals will be considered independently by this Court, whether the Commission's cross-appeal or application for certiorari is sustained or not.

III.

The real rate of return received by the Company is greater than 6.26 per cent., but even if this is not so, the

Company has not met the burden of showing that such rate is confiscatory, when the question is considered with relation to all relevant facts.

IV.

Rates must not exceed the value of the service to the public. The Company has failed to show that a further increase in the rates of fare would not be, under the circumstances, unreasonable to the public.

V.

The action of the Commission in abolishing the second fare on the Company's Halethorpe line was based on substantial evidence and was lawful. In a case where, as here, the question is as to the reasonableness of an entire schedule of rates particular rates on particular lines are immaterial if the schedule as a whole is reasonable.

VI.

The Maryland statutes, as construed and applied by the Court of Appeals, did not deprive the Company of a judicial review of the question of confiscation.

ARGUMENT.

I.

The Burden is on the Company to Show that the Action of the Commission, Upheld by the Court of Appeals, in its Final Result and as a Reality is Necessarily confiscatory of Its Property Under the Rules of Federal Law. To Succeed It Must Present a Record Here Which Shows that the Rate of Return, When Applied to a Rate Base Arrived at in Accordance with Federal Law, Would Be Confiscatory. Under the Rules Sanctioned by this

Court in Confiscation Cases, a Value Much Lower Than than Found by the Commission Under Maryland Law Would Have Resulted. It is Our Contention, Therefore, that Though the Commission Established the Value It Did in Accordance with Maryland Law, It Did So Without Giving Consideration to the Loss of Value Resulting From Loss of Traffic Due to Automobile Competition, But Did Consider and Give Effect to this Factor When Fixing the Rate of Return. In this Court, Therefore, the Company Must Show, But Has Failed to Show, that the Result of This Action by the Commission Necessarily Results in the Confiscation of Its Property. The Company Cannot Have at One and the Same Time State Law as to Value and Federal Law as to Rate of Return. This Court Should Therefore Affirm the Decree on the Company's Appeal, Even Though It May Consider a Rate of Return of 6.26 Per Cent. Too Low, Because This Record on the One Hand Discloses That the Actual Return Permitted the Company Would Constitute a Much Higher Percentage of a Rate Base Arrived at by the Application of Federal Rules, and on the Other Hand Does Not Negative the Presumption that so Regarded it Would Constitute so High a Percentage of a Federal Rate Base as to Meet this Court's Approval.

(1) It has been seen that the "Valuation Case" began in 1912 and was conducted as a separate proceeding from the case at bar. In 1926 the value of the Company's property as of January 1, 1924, was fixed by the Commission at $70,000,000, exclusive of easements. The litigation as to easements, above recited, finally terminated in a new finding by the Commission as to their value, which was fixed at $5,000,000, on February 1, 1928. This finding was taken up into the present case and there brought down to date in the opinion of the Commission

filed February 10, 1928. As will be shown, *the Commission did not in the valuation case consider at all the effect on the value of the Company's property which resulted from the falling off in its business on account of private automobile competition.* The Commission's opinion in the *present case,* however, shows that this factor was in the minds of the Commission. As to the adverse effect on the Company's earnings of this relatively new form of competition invading the field theretofore monopolized by the Company there can be no doubt. The Court of Appeals said (R. 1642): "There seems to be no question but that the private automobile is a serious competitor of the Company, and it is estimated that it carries about 25 per cent. of those who would but for it use the street cars, and it is possible that it may make further inroads on its business, regardless of rates." Two possible methods of dealing with such a situation would ordinarily be open to a commission, by either of which a reasonable return would be assured the utility: (1) to reflect the lessened earning power by reducing the value of the rate base, or (2) to apply a reduced percentage rate of return to a rate base of undiminished value. The Commission in this case did not adopt the first alternative and, for reasons to be stated, could not, we submit, have done so under the Maryland law. That the Commission followed the second alternative is plain.

In the valuation case the rate base had been fixed, but the Commission in the fare case was confronted with the fact *that competition had decreased the value of the business.* Obviously such a patent fact could not be ignored. Hence, underlying all the reasoning and the conclusions of the Commission, we find an effort to deal with this condition. Undeniably the existing competition created a "risk." And certainly the risk involved in

loss of patronage could by no possibility have been held to *increase* the value of the business, i. e. the return therefrom. Should, then, this particular kind of risk, under the circumstances, require the Commission in fixing a fair rate of return, to apply to a rate base whose value had been fixed as if this same risk did not exist the same percentage it would, under federal rules, be required to apply to a rate base whose value had been fixed after taking account of such risk? Clearly such a risk must have been given effect by the Commission in some form. The problem was no mere matter of applying to a rate base an arbitrary percentage figure. This the Commission recognized. In dealing with the Company's argument to the effect that because certain utilities had been held entitled to an 8 per cent. return this Company was entitled to more because of the increased risk, the Commission said (R. 38):

> "This Commission feels that the risk of the business, which is largely due to automobile competition, is in fact the element which limits the rate of return which the Company *can earn*, rather than justifies an increasing return, in the same manner that it limits riding." (Italics supplied).

And again the Commission said (R. 39):

> "Now the street car is encountering the competition of the private automobile. That competition cannot be checked by any means now available. The street railway is still a necessary means of transportation and is the only means of handling passengers in large numbers at present available. But it certainly cannot follow that, because it is faced with a serious risk to its future, the risk itself entitles it to a greater return on the value of its property than are those utilities which have no such risk. * * * But the Company cannot depend upon regulation and increasing rates to save it from ultimate disaster, if, because of the automobile, or any other new

> agency of transportation, its service becomes obsolete, and the use of that service is confined to comparatively few people. The Company has been protected from jitney competition and its rates have heretofore been raised to meet increasing costs of rendering service, but there is a limit beyond which the Commission cannot go in permitting higher rates to meet, not increasing costs of doing business, but failure to earn a sufficient return, due to the falling off of business."

What is this but saying that the risk involved in competition has lessened *values?* In making these statements as to this Company and as to street railway companies in general the Commission did nothing other than call attention to the obvious fact that the value of their properties has been commercially lessened by competition. The Commission stated the proposition, however, from the point of view of *earnings* instead of from the point of view of *value;* but this mode of statement cannot alter the fact that the Commission recognized, and properly recognized, *that this Company was unable commercially to earn by the use of its property as much revenue as it could have earned by the use of the same property when it monopolized the field.* We submit that when, as here, the issue is one of confiscation, it is not methods but results which are controlling. Lessened value was an indisputable fact: what the Commission did was to give this fact recognition *not in terms of the rate base but in terms of the rate of return.* Compare *Cedar Rapids Gas Light Co. v. City of Cedar Rapids,* 223 U. S. 655, 670, where this Court in sustaining a rate said:

> "In this case the Court fixed a *value* on the plant *that considerably exceeded its cost,* and estimated that, under the ordinance, the return would be over 6 per cent." (Italics supplied).

The opinions of the Commission in the valuation case (R. 279-308; 313-334; 338-355) show that the method used by it in finding "value" was to estimate the cost, at then prevailing prices, of reproducing new the Company's plant as then existing and, from the figures so found, deducting observed (and not functional) depreciation. Two estimates were before the Commission, that of the People's Counsel and that of the Company. Both the People's Counsel and the counsel for the Company, in preparing their valuation figures, followed the account numbers of the uniform system of accounts of the Public Service Commission, and placed their value on the items as described under the different account numbers (R. 284). The Commission then made its choice. As to the non-physical property, i. e. overheads, the same procedure was followed. It thus appears that, with negligible exceptions, People's Counsel on the one hand and the Company on the other differed only in amounts and not as to *classes* of tangible or intangible property which should be included in the rate base. And as stated the Commission made its choice between the two estimates. (See table of comparison facing R. 308). There is not a word in the opinion of the Commission *in this valuation case* as to the amount of traffic then actually available to the Company. It is true that in 1925 and 1926 when most of the engineering work leading up to the valuation was done the situation as to automobile competition was not as acute as it had become at the time of the hearing in the present fare case. But the traffic carried by the Company had been steadily diminishing since 1920. In 1920 the Company carried (in round figures) 253,000,000 revenue passengers, in 1926, 225,000,000 (Company Exhibit 11, R. 1406). The Commission estimated that in 1928 revenue passengers would be still further reduced to 215,000,000 (R. 56). Under the fed-

eral rules of law weight must be attached to such facts. See *Southern Rwy. Co. v. Kentucky*, 274 U. S. 76, 82, where it was said: "Much weight is to be given to present and prospective earning capacity at rates that are reasonable, *having regard to traffic available and competitive and other conditions prevailing in the territories served*" (Italics supplied). Not only was no effect in fact given by the Commission to the traffic available to the Company, *but a value was assigned to its property as if it enjoyed a monopoly of all the transportation business in the city and had no competition at all.* Moreover the plant was envisaged as if it had been reproduced new and was ready to begin operations with all the benefits resulting from its past experience; that is to say, it was allowed a "going value" of $8,560,210, or 12½ per cent. of the value of its physical property and overheads. The Company's claim under this item was $16,000,000 (R. 297). But it is entirely clear that the Commission in reducing the Company's figure for this item did not do so on the ground that automobile competition had supervened. In addition, functional depreciation was not considered. *Thus the Commission fixed the value of the Company's plant exactly as if no adverse change whatever had taken place in the commercial field which it had been designed to serve. The reduced volume of its business was ignored. And the earnings which it might commercially command were given no effect.*

We submit that under the Maryland decisions the Commission could not have done otherwise.

While *nominally* adhering to the rule laid down in *Smyth v. Ames*, 169 U. S. 466, the Maryland cases have in fact excluded, in arriving at value, one element mentioned in that case and which, in the case at bar, assumes

very great importance, just as other elements in the rule have from time to time taken on greater or less degrees of importance under changing conditions. We refer to the statement in *Smyth v. Ames*, that in order to ascertain value "the probable earning capacity of the property under particular rates prescribed by statute * * *" is one element to be considered. The two Maryland cases now to be discussed not only exclude this element, but also exclude from consideration the effect upon value of the commercially possible earnings.

In *Havre de Grace Bridge Co. v. P. S. C.*, 132 Md. 16 (1918), the P. W. & B. Railroad Company found its single track railroad bridge across the Susquehanna River insufficient for its use and obtained assent from the Maryland Legislature and the War Department to the construction of a double track bridge paralleling the old one. As a condition of the grant the company was required to remove the old bridge, which would have entailed expense upon the company. It therefore endeavored to interest the county authorities in a proposition to convert the bridge into a highway bridge maintained by them. Unsuccessful in this, the company finally induced certain individuals to form a corporation to take over, operate and maintain the bridge. At a large expense to itself the railway company adapted the bridge for use as a highway bridge and then transferred it to the corporation. In effect, therefore, the railway made a present of the bridge to the corporation. After several years the bridge company became extraordinarily profitable due to two factors, the development of good roads and increasing automobile traffic. Complaint was soon made to the Public Service Commission of Maryland as to the tolls charged. Complainants claimed that these were unreasonable because the bridge had cost its owners

practically nothing. The bridge company contended that its tolls were reasonable in fact and that the amount of its earnings was therefore immaterial. The Court held that the fair value of the bridge must be determined and a fair rate of return allowed to the company on such value. Obviously the bridge company could *commercially earn* a large revenue, and one of the questions was what effect this should be given in arriving at the value of the bridge. The Court said (page 27):

> "What the Commission in this case was authorized to ascertain under the section referred to was the *fair value* of the property.
>
> "In the rate making cases reported, different starting points have been taken, and the weight accorded to the several factors which enter into such a question have varied greatly. In some that which had most weight with the Commission was the question of the net earnings of the corporation, but 'the fact that the net earnings of the carrier may be large does not of itself justify us in fixing a rate at less than is reasonable for the service all other things being considered.' *R. R. Commissioners v. Ill. Cent. R. R.*, 20 I. C. C. 181.
>
> "This suggests a question, does the reasonableness of valuation depend on the income derived, or the reasonableness of the rate depend on the valuation fixed? The only case which has attempted to give a direct answer on this point is the *Kennebec Water District v. Waterville, supra*, and is to the effect that the reasonableness of the rates is dependent upon the value of the property."

In *Miles v. Public Service Commission*, 151 Md. 337, the question, already herein referred to, was whether the easements of this Company should be included in the rate base at all and, if so, what was the proper basis to be used in arriving at their value. The Court held

that these easements were property and should be included, but that they should be *treated solely as an interest in real estate and that any value attributable to earnings they might produce must be excluded.* The Court was of opinion that since in rate cases the value of a utility's property is to be found for the purpose of fixing its rates, it would be arguing in a circle to determine that value with reference to its earnings from the rates. Prior cases had decided that such easements, for *taxation purposes* must be valued with reference to the extent that such easements were responsible for the corporations earnings. In the instant case the Court distinguished those authorities as follows, at page 342:

> "Neither is it true that because this character of property is designated as an easement or interest in land, and as such is entitled to be accorded some value, it should be given the same value for fixing a rate base as that given it for taxation purposes. On the contrary, there is a controlling reason why the two valuations should not be identical. In the valuation for rate making purposes, property of the public service corporation, the value of which depends upon the earnings of the corporation, should not be included, for the reason that the earnings upon which the value of the property depends are largely controlled and determined by the rate which is allowed to be charged for the service rendered."

There is, of course, a plain distinction between finding value on the basis of capitalized earnings resulting from rates fixed by a regulatory body, and *considering the effect upon the value of property of the earnings which may reasonably be expected to result from the patronage which may be available.* Ordinarily the *use* to which property may be put is an important element in its value; if, for example, a street railway company serves many patrons, it should have a higher value than if it serves

few. But this very factor was expressly excluded in this case. At page 345 the Court continued:

> "We are of the opinion, therefore, that the duty of the commission imposed by the statute is to fix the fair value of the property of the corporation used for the convenience of the public, and that, in fixing the value of the easements for the purpose of a rate base, they are confined to such sum as fairly represents their value as an interest in land, and cannot add to that any value which might be affected by the rate which the corporation may be allowed to charge, *or such value as is dependent upon the use to which the franchise of the corporation permits the easement to be put.*" (Italics supplied).

The rule laid down by the Court of Appeals of Maryland is contrary to the doctrine sanctioned by this Court. In *Southern R. Co. v. Kentucky*, 274 U. S. 76, 82, it was said:

> "The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation. • • • *Much weight is to be given to present and prospective earning capacity at rates that are reasonable, having regard to traffic available and competitive and other conditions prevailing in the territory served.*" (Italics supplied).

(2) Apart from the effect of these Maryland cases on the valuation found by the Commission, its action in this case has the effect of a legislative act of the state. It is a state statute which our opponents seek to overthrow. We submit that the burden is on them to prove that the result of this state action is necessarily confiscatory of their property. Using this analogy, can it be doubted that if a state statute denied a public utility the right to earn a return greater than 5 per cent., but at the same

time prescribed that such percentage should be calculated on a valuation of its property to be determined by the highest price level prevailing in the locality within one hundred years next preceding the date of valuation, the result so calculated would not be held confiscatory by this Court merely because the percentage rate of return was, abstractly, deemed to be low, as compared with then existing prices? This must follow from the fact that no utility is entitled to a schedule of fares yielding it any particular percentage rate of return in the abstract, but is only entitled to a return in money resulting from the application of a fair percentage rate to the fair value of its property. The amount in terms of percentage must depend entirely upon the nature and amount of the rate base to which that percentage is to be applied. A return in dollars and cents may represent either a high percentage of a low valuation or a low percentage of a high valuation; and if it is not shown that the result obtained in either way necessarily works a confiscation of property, there is no violation of the Fourteenth Amendment. That is to say, if a proper adjustment is maintained between the two factors of rate base and rate of return, it can make no difference under the Constitution what those two factors are. They must be regarded simply as *measures* of the confiscatory or non-confiscatory character of a sum of money, but they are of no value for this purpose unless they are considered in combination.

Therefore, the Company cannot, as it in this case seeks to do, segregate and consider separately these two factors which, taken together, measure the return in dollars and cents, when what is in issue is in reality the adequacy of the sum itself.

Now it is true that the Commission has found that the property of this Company was worth $75,000,000. It does not, of course, ask this Court to revise that valuation. What the Commission does say, however, and what we contend it has a right to say, is that this Court will, in determining the question of confiscation, recognize that it was reasonable for the Commission under the facts in evidence before it to fix the percentage rate of return so as to reflect the undoubted fact that a new factor (not given effect to in arriving at the rate base) had entered which rendered the rate of return reasonable under the circumstances. Therefore, to justify a reversal of the decree below the record here must satisfy this Court that even if the percentage rate of return was in the abstract low, it was not offset by the allowance to the Company of an unduly liberal valuation.

We submit that it is not enough for the Company to show that the Commission itself has fixed the rate base and then to show that the rate of return is low as compared with other rates, for that would be applying a mere formula without reference to the realities of the situation. What the Company must show here is either (1) that the Commission could not in fixing the percentage rate of return properly reflect therein the lessened value of the property of the Company, or (2) that even if the Commission could adopt this course still the necessary result was confiscatory.

It cannot be denied that whereas a rate base may remain constant, changing conditions, often rapidly changing conditions, may materially affect the percentage constituting a fair rate of return. In essence such changes must necessarily be changes *affecting values*, but it does not follow that a commission is not at liberty to alter

the percentage rate of return allowed a company without first revising the rate base also fixed by it so as to reflect a change in value. This Court has held that on the question of the fairness of the return the fact that a deduction from operating expenses for the federal income tax must be allowed, could be taken into consideration in determining what rate of return should be deemed fair. For, as was said in *Galveston Electric Co. v. Galveston*, 258 U. S. 388, at 399-400: "This tax exemption is, therefore, in effect, part of the return on the investment." The same principle is illustrated in *Chesapeake & Potomac Telephone Co. v. Whitman*, 3 Fed. (2d) 938. In that case, under the particular circumstances, the court took the view that an actual percentage rate of return amounting to but 6 per cent. might have been too low, but notwithstanding that view permitted the commission to fix a schedule of rates which limited the rate of return to 6 per cent. because in substance the actual return permitted the utility included not only the six per cent. rate of return but also additional return in the form of payments made by the utility to its parent company, the American Telephone and Telegraph Company, to cover cost of financing, etc., which payments were allowed as operating expenses.

So long, therefore, as a utility is in reality permitted to receive a fair return, it can make no difference whether it receives that actual fair return in the form of what the state agencies call rate of return or in the form of what they designate as valuation or depreciation allowance. In *Wisconsin-Minnesota L. & R. Co. v. R. R. Comm.*, 183 Wisc. 96, 99, it was said:

> "The constitutional rights of a utility are not invaded by the pursuit of a wrong method of valuation. * * * It is not its method that is to be re-

viewed but the result reached by the commission. The statute charges the commission with the duty of ascertaining and declaring a reasonable rate. If that is done, the method by which the commission arrives at the result is not subject to criticism."

The Commission's cross-appeal in this case was addressed solely to the allowance to the Company of the inflated depreciation allowance, which will be considered in more detail below, but the Commission fixed the value of the Company's property itself and, of course, prosecuted no cross-appeal. It will at once, therefore, be said that the Commission as appellee is attempting by indirection to overturn its own action and to attack the decree below without having resort to a cross-appeal. Not so. The considerations now urged upon this Court by the Commission are clearly in support of the decree in its favor. What the Commission objects to is the attempt of the Company to make the valuation, fixed as it was, an obstacle to consideration by the Commission, when fixing percentage rate of return of facts in evidence which justify that rate.

The rate base was not reduced. The facts in evidence show that the Commission would have been justified in reducing it. We have argued that it could not do so as a matter of Maryland law. The Company demands that the rate base shall stand and that there shall be applied to it a percentage rate of return which would only be justifiable under utterly different conditions. But manifestly, the Company cannot have both an increased rate base and an increased rate of return. That would make the resultant of the two inequitable and unfair. The Company now insists that the percentage rate of return, estimated by the Commission to be 6.26 per cent., be enlarged. If that is done, it will be no more than

fair that the rate base be diminished. In urging on this Court these considerations, the Commission does not in its capacity of appellee seek to enlarge its own rights under the decree, nor to lessen the rights of the Company. Rather is its argument a manifestation that the appellant has failed to demonstrate upon this record that the decree of the court below sustaining the action of the Commission was necessarily wrong in its result and effect, regardless of the reasoning or methods by which it was arrived at. In *U. S. v. American Rwy. Express Co.*, 265 U. S. 425, this Court called attention to the right of an appellee to make such an argument in support of the decree below. At page 435 it was said:

> "It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto, when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. *But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it.* By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined" (Italics supplied).

And this Court in passing upon questions under the Constitution of the United States, such as the question of confiscation *vel non*, will look through forms to substance and behind the reasoning and methods employed.

If it is not demonstrated to this Court by the appellant that the decree,—not in the steps by which it was arrived at,—but in its result and effect, in substance and in fact deprives the Company of property without due process of law, the decree will be affirmed. In *Pacific Gas & Electric Co. v. City of San Francisco,* 265 U. S. 403, 415, it was said:

> "Our concern is with confiscation. Rate making is no function of the courts; their duty is to inquire concerning *results,* and uphold the guaranties which inhibit the taking of private property for public use without just compensation *under any guise"* (Italics suppied).

On the issue of confiscation, therefore, this Court is not bound by the findings below as to the rate base any more than it is bound by the findings as to the percentage rate of return. Insofar as questions under the Fourteenth Amendment are concerned, a state may place any valuation it pleases on utility property so long as it does not deny a fair return in dollars upon its real value. For example, let us suppose that under the rule of *Smyth v. Ames,* the fair value of the Company's property is in fact $60,000,000; and further, that in Baltimore City at the present time and under the peculiar circumstances surrounding this Company no return amounting to less than 8 per cent. of that valuation would be fair, but that such return, amounting to $4,800,000, would be adequate. Now, if a statute of the State of Maryland should compel the Commission to add $15,000,000 to the Company's valuation, could the Company be permited to argue that this Court is bound to accept, not the true valuation of $60,000,000, but the inflated valuation of $75,000,000, and that this Court must apply thereto a percentage rate of return of 8 per

cent. and thereby determine that the return of $4,800,000 was confiscatory?

Cases arising under the contract clause (Constitution of the United States, Art. 3, Sec. 10) are ample authority for the legal principle here invoked. Where rights under the Constitution of the United States are drawn into question, it becomes the function and duty of this Court *itself to examine into and determine* the bases of the challenged decree. That principle was discussed at length in the opinion of this Court delivered by the Chief Justice in *Appleby v. New York*, 271 U. S. 364, 379-380, as follows:

> "The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the state court? *These questions we must answer independently of the conclusion of that court.* Of course, we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the question *independent consideration.* It makes no difference what the answer to them involves, whether it turns on issues of general or purely local law, *we cannot surrender the duty to exercise our own judgment.* In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the State and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the state, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state court then and since made; but *we must give our own judgment derived from*

such sources and not accept the present conclusion of the state court without inquiry.

"Ordinarily this Court must receive from the court of last resort of a state its statement of state law as final and conclusive, but the rule is different in a case like this" (Italics supplied).

And the rule is no different in cases where the state court has resolved some element of the question against the state and in favor of the party complaining. In such a case also this court will go behind the determination of the state court to see whether the step taken toward the final result was in fact what it purported to be as tested by this Court's own independent judgment. In *New Orleans Water Works Co. v. Louisiana Sugar Rfg. Co.*, 125 U. S. 18, 38, Mr. Justice Gray said:

"When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract; and if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, it may on that ground affirm the judgment."

Nor is the principle confined to questions arising under the contract clause, but extends to and embraces questions arising under any of the constitutional guaranties. So in *South Carolina v. United States*, 199 U. S. 437, this Court determined for itself, regardless of the determination of the state of South Carolina, whether a state conducted liquor business is in fact a state governmental function which can escape federal taxation under the doctrine of *Collector v. Day*, 11 Wall. 113.

And if the highest court of a state declines to give full faith and credit to a judgment of another state because in

its opinion that judgment was for a penalty this Court in determining whether full faith and credit have been given to that judgment must decide for itself whether the original cause of action was penal in the international sense. See *Huntington v. Attrill*, 146 U. S. 657, 684.

The converse of the argument above presented was made in this Court by the appellant in the case of *Dayton-Goose Creek Rwy. Co. v. U. S.*, 263 U. S. 456. In sustaining the validity of the recapture provisions of the Esch-Cummins Act, this Court since it appeared from the record that the utility involved, even after the statute was applied to its earnings, would still be earning in excess of 8 per cent. upon its fair value, refused to commit itself to what its determination might be if in a particular case the application of the statute should prevent a particular carrier from earning more than a low percentage rate of return. The appellant attempted to argue that the rate base had been fixed at too low a figure and in disregard of its earning power and hence that the return permitted it in dollars and cents was in fact not higher than 6 per cent. of its true valuation. Obviously this argument would have been sound, if the record in the case, for which the appellant was responsible, had clearly disclosed that an error as to valuation had been committed below, and the extent of that error. This Court, in its opinion delivered by the Chief Justice, said nothing to impugn the validity of the argument itself but refused to consider it because the contention was not supported by the facts in the record. The Court said, page 486:

"It is also said in argument that the value of the carrier's property upon which the net income was calculated was too low and was unfair to the carrier. The value of the property, it is argued, depends on the profit to be expected from its use, and should be calculated on the income from rates pre-

vailing when the law was passed, which must be presumed to have been reasonable. The true value of the carrier's property would thus be shown to be so much higher than reported that the actual return would be no higher than 6 per cent. of it, and there would be no excess.

"We do not think that, *with the record as it is, such an argument is open to the appellant.* It did allege that the values upon which the return was estimated were not the true values, but it did not allege what the true values were. This was not good pleading and did not properly tender the issue on the question of value." (Italics supplied).

But although it may be denied to the appellant to urge against the validity of a decree or legislative act, carrying with them the presumption of constitutionality and correctness, a supposed error, unless he has inserted in the record facts which clearly demonstrate that an error was committed below and the extent of the error making it overwhelmingly plain, not only that an error in reasoning and method was made, but that such error has affected the final decree, nevertheless it may well be open to the appellee to urge in support of a decree considerations appearing in the record which indicate that the decree was proper in its final result and which have not been negatived by the appellant.

II.

The Commission Was Compelled by the Ruling of the Court of Appeals in this Case to Fix the Depreciation Allowance on Value Instead of on Cost. We Contend that this View of the Court of Appeals is Erroneous and Contrary to the Doctrine of this Court and that Consequently the Company is Now Permitted, Under the Rates of Fare Fixed by the Commission, to Collect an

Annual Sum for Depreciation Much in Excess of that Required to Make Good the Depreciation in Fact Suffered by It. It is Our Contention, Therefore, that on an Issue of Confiscation the Legal Validity of this Action of the Court of Appeals Will Be Considered Independently by this Court Whether the Commission's Cross-Appeal or Application for Certiorari is Sustained or Not.

(1) The original claim of the Company was for an annual depreciation allowance of $2,200,000. The Commission allowed $883,544 (R. 39-48). On the Company's first appeal the Court of Appeals held that the Commission had made an error of law in calculating this allowance on the basis of cost and not value and remanded the case to the Commission (through the Circuit Court No. 2 of Baltimore City) with instructions to recalculate the allowance using value as the basis (R. 1647-1653; 1680). Thus compelled, the Commission recalculated the allowance on the basis of the present value of the Company's depreciable property and increased the same to the sum of $1,638,660 which it found was equal to a rate of 3.6 per cent. on the value of the Company's depreciable property. Though the sum allowed by the Commission fell short of that originally demanded by the Company by the amount of $561,340 and though the whole argument of the Company to the effect that annual depreciation must be calculated on value instead of on cost rests on the proposition that only thus can a gradual confiscation of the Company's *property* be avoided, *nevertheless the Company did not appeal from this second allowance made by the Commission.* Therefore, it has *accepted* according to its own theory a property loss of $561,340 per annum.

In the Court below it was assumed that the method first adopted by the Commission was to base the allow-

ance on cost, i. e. so as to provide for retirements at cost. In fact, however, the allowance was expressed as 5 per cent. of the gross revenue of the Company, this percentage having been found sufficient in the past to permit retirements at cost.

Prior to 1912 the Company set up no annual depreciation allowance at all. Since that time, and until the inception of the present case, it set up 5 per cent. of gross revenue for this purpose. The Court of Appeals (R. 1649) held that "there is no apparent connection or relation between the income which property yields and the depreciation resulting from its use in earning that income." But the fact is that in practice annual depreciation expense is often expressed as a percentage of gross revenue; sometimes as so many cents per car mile and sometimes it is combined with the annual maintenance charge (as a percentage of gross) and sometimes the allowance is based on the amount of capital stock. Each of these methods has certain advantages. One of the Company's witnesses, Mr. Nash (R. 839-840), testified that there were certain practical advantages in fixing the allowance upon gross earnings. Another Company witness, Mr. Zimmerman of Day and Zimmerman, contended, in one of the prior rate cases, that the allowance should be fixed at three cents per car mile (R. 171). The advocates of this latter method claim that, particularly in regard to rolling stock, the number of car miles operated has a direct relation to the depreciation of the equipment. Obviously the number of car miles operated has its reflection in the gross earnings, so that it cannot be said that fixing the allowance at a percentage of gross has no relation to the depreciation actually experienced.

In this connection it should be noted that Mr. Zimmerman gave his testimony in a prior rate case in 1919.

During that year the total car miles operated by the Company was 35,324,733 (R. 169), and on the basis of three cents per car mile annual depreciation would then have been $1,059,741.99. In 1919 costs were higher than in 1926, 1927 or 1928. In the case at bar the car miles operated by the Company for the year 1926 (the last year for which figures are available) amounted to 35,304,583 (Company Exhibit No. 17, R. 1417). Applying Mr. Zimmerman's figure of three cents per car mile, the annual depreciation charge would in 1926 have been $1,059,137.49,—*less, by* $579,522.51, *than that now in effect.*

The effect of the allowance of 5 per cent. on gross is shown by the actual experience of the Company.

The Commission found (R. 45):

> "However, the allowance which this Commission has made for depreciation, 5 per cent. of the gross revenues, has provided fairly well for current depreciation and retirements and has permitted the accumulation of a reserve amounting to $1,413,793 on August 31, 1927. This percentage of gross revenues for depreciation has been set up by the Company since 1912, and in that time it had amounted to $10,537,960."

Further, it was found that the Company's property was well maintained (R. 48).

(2) In *U. S. v. Ludey*, 274 U. S. 295, this Court considered the question of the basis on which to calculate, under the income tax law, the profit realized upon a sale of property. It was held that the annual depreciation must be deducted from the original cost (or the value, if higher than cost, of that acquired before 1913) in order to ascertain the cost of the property sold. This Court said (pages 300-301):

> "The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate sum set aside will (with the salvage value) *suffice to provide an amount equal to the original cost.*" (Italics supplied).

The property in question in the case consisted besides mining equipment in part of oil land. No distinction, however, was made between such property and that used in any other business, the Court saying (page 301):

> "Such being the rule applicable to merchandising and mercantile businesses, no good reason appears why the business of mining should be treated differently."

As appears from the above, some of the property in question had been acquired prior to March 1, 1913, at a cost *less* than its *value* on that date. No distinction, however, is made in the opinion in the treatment of this property insofar as the depreciation allowance was concerned.

The rule thus announced by this Court is the rule universally followed and practiced by accountants. It is no mere bookkeeping formula, but is a rule of substance. Every business which determines the results of operations does so by applying the principles of accounting. The net income or loss is an accounting conception. Myriads of statements prepared annually, designed to show the realities as to the operations of businesses, are prepared in accordance with the well established, uniform and widely recognized principles of the science of accounting. In computing net incomes, accordingly, all expenses, costs and losses are deducted from the revenue. Depreciation is one of the most important ex-

penses. In early days, however, it was not recognized. And, when a depreciable asset was worn out, the cost thereof was charged to the income of the year in which the asset was discarded. Consequently, that one particular year bore the entire burden of the cost of the asset with the resultant distortion of profits, although, in fact the asset had been gradually used up during the whole period of its useful existence. Later it was recognized that a machine or any other depreciable asset is consumed in operation in exactly the same sense as raw material and labor are consumed and that each year's operations should therefore bear the cost of that part of the machine consumed during that year. "The theory underlying this allowance for depreciation is that by using up the plant a gradual sale is made of it. The depreciation charged is the measure of the cost of the part which has been sold." *U. S. v. Ludley, supra,* at page 301. Now, if a corporation purchases very large quantities of raw materials at very favorable terms and prior to consumption the market value goes up, it would not be argued that its raw material expense should be increased, for, in fact, that expense has not increased. To argue that depreciation expense should be based upon theoretical present values rather than upon actual cost is tantamount to arguing that the raw material in the illustration just given should be taken as an expense at present market value rather than at cost. Since all of the property, including raw materials and supplies, of a business is gradually being sold or consumed as a result of its operations, the only difference between classes of property is that some classes are consumed within a relatively short period of time whereas other classes of property have a longer life. Time, therefore, and time alone, is the varying element and it is submitted that time

is not such a factor as to justify the enormous difference in treatment contended for by the Company in this case.

In 1 *Montgomery, Auditing Theory & Practice* (1921) page 634, it is said:

> "The question of depreciation should be considered only in connection with the cost of the item to be depreciated. The fact that the value of the property has increased or decreased and that the cost of replacements may be greater or less, should have no bearing on the amount to be set aside. However, if, for instance, it is the intention of the management to purchase replacements costing double the price of the original property without new financing net amounts should be reserved for this purpose from surplus."

> "We often see a statement in published reports that a corporation has realized a net income amounting to a certain sum and that out of this net income an allowance for depreciation has been made. It is just as logical to state that a candy manufacturer has an earned income of one thousand dollars and out of said one thousand dollars there has been set aside twenty thousand dollars to pay for the sugar consumed in the manufacture of the candy. The use of that which is consumed is a loss or expense. Machinery is consumed; sugar is consumed. You cannot say that one is an operating expense and the other is an item which need not be ascertained or taken into account until the net income is shown."

In *Powelson, Introductory Accounting,* it is said at pages 398-405:

> "Theoretically, to exclude depreciation among the expenses may be a grave oversight. For instance, the loss incident to the wear and tear of a machine used to manufacture an article, is as much a part of the cost of the article as the raw material used, be-

cause the machine itself is consumed in the process of manufacture; and yet if the manufacturer does not recognize this fact, he may sell his product at a loss. The cost of a worn out machine is an expense or a loss to the business no less than the cost of one destroyed in an accident. * * * The total depreciation to be charged for any given asset is its cost less scrap value."

In *Lawrence on Cost Accounting* (1926), page 308, it is said:

"It is believed that it is not in accordance with sound accounting principles to charge depreciation on replacement values. The purpose of depreciation is to protect capital tied up in fixed assets against loss due to wear and tear, action of the elements and other elements which affect the usefulness of the asset. The amount of capital invested in the asset is to be kept at its original amount through credits to the depreciation reserve, but this does not imply that the capital is to be increased or diminished in accordance with price fluctuations. In other words, the depreciation reserve is not intended to guarantee the purchasing power of the dollar."

The Interstate Commerce Commission in an exhaustive report dealing with the depreciation charges of telephone companies and of steam railroad companies, 118 I. C. C. 295, at pages 342, 343 and 344 said:

"We further find that depreciation is the loss in service value not restored by current maintenance other than extraordinary repairs, as defined in finding (2) infra, and incurred in connection with the consumptiton or prospective retirement of property in the course of service from causes against which the carrier is not protected by insurance, which are known to be in current operation and whose effect can be forecast with a reasonable approach to accuracy * * *. The term 'service value' shall be construed to mean the difference between the original

cost of the property involved plus the additions and replacements thereto, including the applicable portion of interest during the construction, and the estimated salvage value at the time of retirement. It is the cost of the investment which must be provided for through depreciation charges. * * * It is agreed by all that depreciation expense should be based primarily upon the original cost to the accounting company of the unit of property in question. The principle is precisely the same in the case of the expense incurred over a period of years in the consumption of long-lived property in service, as it is in the case of the expense incurred in the more immediate consumption of such property as coal."

The posititon of the American Telegraph & Telephone Company on this subject is thus set forth in *Whitten-Wilcox, Valuation of Public Service Corporations* (2d Ed. 1928, Vol. 2, page 1829):

"(a) Accruals should be based on original cost or investment.

"All telephone property, excepting land, is subject to depreciation and the continual consumption of the investment is a part of the cost of the service and must be provided for by charges against earnings.

"The sound theory is that the charges to the reserve for depreciation should be based on the original cost of the property retired, less the net salvage credit. This is demonstrated by the following considerations:

"(1) The function of the depreciation reserve is to amortize the portion of the expense of conducting the business caused by using up its depreciable property.

"(2) The actual amount of this expense is the original cost of its property less net salvage credit.

"(3) This mthod is equitable in that it provides for the amortization of the actual investment during the period it is consumed in rendering the service.

"(4) Upon this theory the amount to be created by the reserve is definite and fixed so that the periodical charges to operating expenses on account of the reserve can be made certain.

"(5) This method tends to certainty and definiteness in the accounting."

The practice of commissions has been to base depreciation on cost.

Missouri Union Telephone Co. (Mo. P. S. C.) P. U. R. 1926 A, 842, 849.
Kansas City Gas Co. (Mo. P. S. C.) P. U. R. 1925 A, 653, 663.
Jackson County Light, Heat and Power Co. (Mo. P. S. C.) P. U. R. 1926 D, 737, 754.
Aluminum Goods Mfg. Co. v. Laclede Gas Light Co. (Mo. P. S. C.) P. U. R. 1927 B, 1, 43.
Kinlock-Bloomington Teleph. Co.(Ill. Commerce Comm.) P. U. R. 1927 E, 135, 143.
Freeport v. Freeport Gas Co. (Ill. Commerce Comm.), P. U. R. 1924 E, 99, 103.
Rockford Gas Light & Coke Co. (Ill. Commerce Comm.), P. U. R. 1922 E, 756, 761.
Rockford Electric Co. (Ill. Commerce Comm.), P. U. R. 1925 D, 1954, 166.
Baird v. Burleson (N. Y. P. S. C. 2nd Dist.), P. U. R. 1920 D, 529.
Milwaukee Electric R. & L. Co. v. Milwaukee, (Wis. R. R. Comm.), P. U. R. 1918 E, 1, 58.
Wisconsin-Minnesota Light and P. Co. (Wis. R. R. Comm.), P. U. R. 1920 D, 428, 435.
Butler Telephone Co. (Ind. P. S. C.), P. U. R. 1927 C, 800, 804.

Coast Gas Co. (N. J. Bd. of P. U. C.), P. U. R. 1923 A, 349, 366.
Elizabethtown Water Co. (N. J. Bd. of P. U. C.), P. U. R. 1927 E, 39, 63.
Duluth Railway Co. (Minn. R. R. and W. Comm.), P. U. R. 1927 A, 41, 53.
Big Spring Electric Co. (Utah P. S. C.), P. U. R. 1927 A, 655, 666.

(3) In the Court below the Company cited the following cases from this Court as sustaining its position:

Knoxville v. Water Co., 212 U. S. 1, 13-14.
Minnesota Rate Cases, 230 U. S. 352, 454.
Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 274, 288.
Bluefield Co. v. Public Service Commission, 262 U. S. 679, 692-695.
Brush Electric Co. vs. Galveston, 262 U. S. 443, 445.
Georgia Railway Co. v. R. R. Commission, 262 U. S. 625, 633.

In the Court below various expressions in the opinions in these cases were seized upon and claimed to sustain the Company's position. In no one of the cases was there any discussion of the point. We submit that it cannot now be asserted that so important a question of law has been foreclosed by this Court without discussion. On the contrary, we submit that the *Knoxville Case* is authority for our position. There this Court speaks of the duty of a public utility company to make an annual depreciation charge so that it shall keep "the *investment* unimpaired." Furthermore the question there at issue was whether in fixing the value of a plant the Company was entitled to add to the rate base certain amounts for

so-called complete and incomplete depreciation which had not in fact been taken by it in the past. This claim was rejected and it was in this connection that the following language relied on by our opponents was used:

> "Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current retirements, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The Company is not bound to see its property depreciate without making provision out of its earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the Company to make such provision but its duty to its bond and its stockholders and in the case of public service corporations at least, its plain duty to the public."

After making the statement just quoted the Court went on to say that if this duty had been neglected in the past, the company would not be allowed to make up this deficiency in the future. The Court said:

> "If, however, the Company failed to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over issue of securities or of omission to exact proper prices for the output, the fault is its own."

Clearly what was here being dealt with was the subject of depreciation in general as affecting the fair value of the company's property which should be included in the rate base, and not the question here at issue as to how or on what basis an annual depreciation charge should be calculated; and *a fortiori*, this Court did not say that in

forecasting the amount of an annual depreciation charge the company must be allowed to charge off retirements at valuation figures rather than at cost. Our opponents, however, seize upon the sentence,—"It is entitled to see that from earnings the *value* of the *property invested* is kept unimpaired so that at the end of any given term of years the original investment remains as it was in the beginning"—and say that by "investment," as used in this sentence, is meant *property invested* and not *money* originally invested *in* property. This construction does violence to the natural meaning of the words used. The Court speaks of *original investment*, which could by no possibility be held to intend original investment *as modified by a subsequent valuation proceeding.* Furthermore, in the second passage, above quoted from the opinion, the word "investment" is obviously used in the sense of financial investment, i. e., *cost.*

The following passage was also cited for the Company from the *Minnesota Rate Cases, supra:*

> "The property is held in private ownership and it is that property and not the original cost of it of which the owner may not be deprived without due process of law."

In that case the question before the Court was as to the method of ascertaining the present value of a utility's property, i. e., the rate base on which to apply a fair rate of return. And it was in that connection that the quoted language was used. The question here under consideration was not discussed or decided. What the Court was discussing was the question as to the method of arriving at fair value and not the question, here involved, as to how the integrity of that fair value could be maintained through the operation of an annual depreciation allowance.

In dealing with the effect of the four remaining cases cited by our opponents, it must be borne in mind, as heretofore stated, that annual depreciation allowances, whatever may be their ultimate purpose or intent, are arrived at by varying methods and expressed in varying ways. The United Railways Company, like many other companies, has, as already stated, always heretofore expressed its allowances as a percentage of its gross earnings. Sometimes courts and commissions, instead of listing it under operating expenses, include it in the rate of return allowed on the fair value of the property, and express it as a percentage without distinguishing between the amount for return and the amount for depreciation. This latter method was adopted in the *Southwestern Bell Telephone Case, supra,* and the *Bluefield Case, supra.* In the *Brush Electric Case, supra,* and the *Georgia Railway Case, supra,* the allowance was expressed as a separate percentage of the value of the property of the utility in question. From these facts our opponents argue that since the percentage was calculated upon the value of the property instead of upon the cost thereof these cases sustain their position that retirements must be charged at valuation figures and not at costs. As a matter of logic the premise does not support the deduction, for the reason that it does not appear in any one of these cases that the percentage figure was designed to, or would in effect, result in permitting the Company to make future retirements at valuation figures rather than at costs. Furthermore, in no one of these cases was the point here at issue directly raised or considered.

The controversy which was before this Court in *Georgia Railway Company v. R. R. Commission, supra,* wherein the action of the District Court in refusing an

interlocutory injunction was affirmed, thereafter was referred by the District Court to a special master. He held that this Court had not decided the question as to the basis for calculating annual depreciation and concluded that the basis should be cost and not value. *Georgia Railway and Power Co. v. R. R. Commission of Georgia*, P. U. R. 1925 A, 546. He said at page 593:

"Only two figures are submitted as proper reserve for replacement: $113,563 by Professor Riggs and $150,000 by Mr. Luick. The Commission, as its report shows, took 2 per cent. on the 'undepreciated fair value' of the physical properties as a proper allowance for this item, and *fixed thatvalue at historical cost* (Italics ours). Mr. Luick estimated 2 per cent. of the depreciable physical properties, excluding land, as the proper basis on which to arrive at reserve for replacement. Neither the Special Tribunal nor the Supreme Court made a definite ruling on this question, but neither Court disturbed the amount of reserve as found by the Commission. The fixing of this figure does not, it seems to the Master, involve valuation, but an estimated allowance for the purpose of preserving the investment. In valuing the property, present value should be found, but the reserve should be applied to the investment, rather than the present value figure, since the reserve ought to be, and is, on principle, created to keep the investment intact * * *.

'The Supreme Court in Knoxville v. Knoxville Water Co., 212 U. S. 1, 13, in discussing this question, says:

'The Company is not bound to see its property gradually waste without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that at the end of any given term of years, the original investment remains as it was at the beginning * * *.

"* * * It has been well said that 'The value of the investment can be maintained provided there is restored to the Company each year such sums of money that, when each item of the plant can be no longer used, there will be in the possession of the company —money and useful plant or useful plant alone, equal in value to its original cost.' (Hayes on 'Public Utilities, Their Fair Present Value and Return,' page 33.)

Lyndon in his book on 'Rate Making for Public Utilities,' page 17 says:

'Depreciation reserve is a fund, the sole purpose and use of which is to preserve the integrity of the original investment required to produce the operating plant.'

Hayes, again, in his 'Public Utilities, Their Fair Present Value and Return,' on page 162, in discussing this question, says:

'It is usual to set aside each year a portion of their cost, so that, when an item has reached the end of its life and must be removed, there has been reserved an amount equal to its original cost.'

* * * * *

To allow a reserve which, during the estimated life of the plant, would amount to more than the original investment, would be to give the utility, out of rates collected from the public, not only a reserve sufficient to keep its investment 'unimpaired, so that at the end—the original investment remains as it was at the beginning'; but additional capital also. The utility should be allowed reserve for replacement sufficient to keep the investment unimpaired, and, in addition, a fair return upon the present value of the property, but the public should not be required to build up, in the form of maintenance reserve, additional capital for the utility."

Three cases were cited in the Court below as sustaining the contention of the Company, to wit:

United Fuel Gas v. R. R. Commission, 13 Fed. (2d) 510, 523 (Affirmed in 278 U. S. 300).
State, ex rel Hopkins, v. Southwestern Bell Telephone Co., 115 Kan. 236.
Michigan Pub. Utilities Commission v. Michigan S. Telephone Co., 228 Mich. 658.

In the first of these cases Judge Hickenlooper held that annual depreciation must be figured upon value rather than cost. This Court affirmed the lower court, but did not specifically pass on the question here at issue.

It must be admitted that the second case above cited is authority against our contention.

In the third case one of the questions involved was whether an accumulated depreciation fund amounting to $9,500,000 should be deducted from the rate base. The court disapproved the action of the commission in deducting it and in discussing this question held, at page 666, that "if the rate base is present fair value then the depreciation base as to depreciable property is the same thing." The *annual charge* for depreciatian was later considered by the court. The commission had fixed the rate at 4 per cent. to be computed on the total fair value less land and right of way (page 672). Against complaint by the company as to the amount this allowance would produce the court said "but this is a question of fact depending largely upon character, nature and age of the property in question and illuminated somewhat by the experience of the Company respecting the subject and it must not be overlooked that, as the costs show, many minor replacements and repairs and maintenance are made and charged to operating expense. In practice, this contributes considerably toward keeping the property intact. The Commission in its opinion (which

see) reviews the question at length and states fully the experience of the Company respecting the rate of depreciation and the accumulation of the fund. The rate fixed is comparatively low but, in the light of the facts in this case, we must decline to hold it confiscatory."

We submit that this question has not only not been decided adversely to our contention by this Court, but that such expressions as it has used on the subject support the view here urged.

(4) The *amount* which it is necessary to charge annually on account of depreciation is a question of fact. It is not a matter of mathematical formulas but rather a matter of judgment. In *Georgia Railway & Power Co. v. R. R. Commission*, 262 U. S. 625, the company objected to the amount of the depreciation charge allowed it by the Special Master and the District Court but this court held, page 633, "this question is one of fact, and we are not convinced that it was wrongly decided below."

No complaint is made in this case that the allowance to this Company for maintenance has been or is insufficient. The Court of Appeals did not find as a fact that the sum of $883,544 per annum estimated as the allowance which would be produced by 5 per cent. of the gross revenues of the Company was insufficient. The Commission found as follows (R. 40):

> "For 1927 the United Railways was allowed approximately 16 per cent. (of the gross) for maintenance and depreciation of which approximately 11 per cent. was for maintenance and 5 per cent. for depreciation. These two accounts yielded in 1927 a total of $2,589,736. It is generally recognized that the property of the Railways Company is well maintained."

III.

The Real Rate of Return Received by the Company is Greater than 6.26 Per Cent., But Even if this is Not So, the Company Has Not Met the Burden of Showing that Such Rate is Confiscatory, When the Question is Considered with Relation to All Relevant Facts.

The Company argued below that the rates of fare fixed by the Commission constituted a limitation of its return to 6.26 per cent. But there is nothing of record to show that, if under the present fares the Company can earn more, the Commission would reduce the rates. The Court of Appeals said (R. 1626):

> "In the argument of the case it was said that the Commission had limited the Company to a return of 6.26 per cent. on the value of its property, but the order did not so state. What it did do, was to fix a schedule of rates, which after deducting the allowances approved by the Commission for maintenance, replacement, operation, financing and other expenses, would yield that return, but if more efficient or economical management resulted in a larger net return there was nothing in the order to prevent the Company from retaining the benefit of that saving, even though it increased its net earnings to more than 6.26 per cent. of the value of its property."

There was ample evidence to sustain the finding of the Commission that a rate of return of 6.26 per cent. is reasonable. The Commission had before it and there is in the Record a history of the Company from the date of its organization in 1899; there is evidence of the fares charged and the returns received by other comparable street railway companies, as well as data indicating price trends, cost of financing and prevailing interest rates. The Company offered experts in support of its position who were cross-examined on behalf of the Commission.

The dissenting opinions in the Court of Appeals (particularly the opinion of Judge Parke, R. 1656-1659) show that the difference between the majority and the minority concerned the weight of this testimony. Judge Parke, dissenting, said at page 1658:

> "The position of the utility is made graver, and the public will not ultimately be benefited by the ruling in the pending case since, in the opinion of the writer of this dissent, the *weight of the evidence*, clearly and satisfactorily establishes that the Commission's limitation of the fair rate of return to 6.26 per centum of the value of its property is confiscatory, and, so unlawful" (Italics supplied).

And again (R. 1659):

> "The clear and convincing testimony in this case is that a basic rate of 6.26 per centum is not a fair return upon the property used, nor sufficient to enable the utility to maintain its credit or to secure its necessary capital at a reasonable cost. This evidence cannot be denied its legal effect by comparing the fares and rates of return allowed to street railway utilities of other municipalities of similar size, where the local conditions and hazards are different and a park tax equivalent to one-half a cent for every fare is not added. Such evidence is entitled to some weight in considering the lawfulness of the rate of return in question, but it is obvious that its value is slight when so much depends upon the circumstances of every case and the nature and method of determining the rate base upon which the return is allowed."

The majority of the Court differed *on the facts*, from the minority as appears by the following (R. 1640-1641).

> "It is argued that an 8 per cent. return is necessary to enable the Company to borrow money at reasonable rates, and that the fact that it is limited to a rate schedule which will yield a return of only 6.26

per cent. puts it at a disadvantage as a borrower and weakens its credit. But the evidence fails to support that contention. It is true that there is in the record a moss of subjective and highly conjectural testimony pro and con relating to it, much of which tends to support the Company's contention, but, whilst its usefulness may be conceded, the speculative opinions of experts who are themselves interested in increasing the rate of return on similar utilities cannot be substituted for the judgment of the Commission, and accepted as a conclusive determination of the question, at least where the judgment of the Commission is based upon substantive evidence."

We now proceed to a discussion of the evidence. On this subject, as on the kindred subject of valuation, this Court has laid down no formula. However, an indication of the factors to be considered was given in *Bluefield Water Works and Improvement Company v. Public Service Commission*, 262 U. S. 679 (1923), where it was said (692-695):

"What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its pub-

lic duties. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions generally.

* * * * *

Investors take into account the result of past operations, especially in recent years, when determining the terms upon which they will invest in such an undertaking. Low, uncertain, or irregular income makes for low prices for the securities of the utility and higher rates of interest to be demanded by investors. The fact that the company may not insist as a matter of constitutional right that past losses be made up by rates to be applied in the present and future tends to weaken credit, and the fact that the utility is protected against being compelled to serve for confiscatory rates tends to support it."

We will first consider the expert testimony.

The Expert Testimony.

Before the Commission the Company introduced the testimony of Mr. Allen G. Hoyt, Vice-President of the National City Company (R. 531-544), and Mr. James C. Fenhagen, of Robert Garrett & Sons, bankers (R. 1142-1161), each of whom in answer to hypothetical questions gave it as his opinion that the Company should be permitted to earn at least 8 per cent. on the value of its property. Mr. J. J. Nelligan, President of the Safe Deposit and Trust Company of Baltimore, also briefly testified for the Company as to its credit situation (R. 544-547). Mr. Nash, of Stone and Webster (R. 836-856), and Mr. Downs, of Day and Zimmerman (R. 857-873), who were called by the Company to testify concerning allowances for depreciation, were cross-examined about the rate of return. The testimony of Mr. Hoyt given in a previous case before the Commission involving the rates of the Consolidated Gas Electric Light and Power

Company of Baltimore was put in evidence in this case (R. 1253-1305). And the testimony of the same witness given by him in the valuation case (R. 1306-1334) was offered in the present case, as was the testimony of Fred S. Burroughs, of Harris, Forbes and Company (R. 1334-1347), given in the valuation case.

The Commission offered no independent *opinion* evidence of its own directly contradicting the conclusions of these witnesses; but they were all subjected to cross-examination and, as already stated, there were other facts in evidence relevant to the question.

Under the authorities the Commission was not bound to take the opinions of these experts as facts.

In *Greencastle Water Works v. Public Service Commission of Indiana, et al.*, 31 Fed. (2d) 600, the statutory court for the Southern District of Indiana said at page 604:

> "Neither the Commission, nor this Court, is bound by the value of the property, as fixed by an engineer. The weight to be given to such testimony is to be determined in the light of the facts of the case in hand. Such evidence, however, must be considered along with all other competent evidence, in determining the fair value of the property. It is in the nature of expert testimony, and the weight to which it is entitled is governed by the rules pertaining to such testimony. Ohio Utilities Co. v. Public Utility Commission, 267 U. S. 359."

In *Idaho Power Company v. Thompson*, 19 Fed. (2d) 547, the statutory court for the Southern District of Idaho said at page 552:

> "And, it is to be added, where a factor in the problem involves prophesy, or rests upon mere opin-

ion evidence, the Commission was not, nor are we, bound to accept absolutely and without qualification one or the other of two conflicting views, or the opinion of a single expert where but one testifies. The Conqueror, 166 U. S. 110, S. Ct. 510, 41 L. Ed. 937. And see Willcox v. Consolidated Gas Co., 212 U. S. 19, 50, 51, 29 S. Ct. 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134, 15 Anno. Cas. 1034."

In *Brooklyn Union Gas Company v. Prendergast*, 7 Fed. (2d) 628, the Court said at page 668:

"Plaintiff seems to contend that, because no evidence was offered by any experts called by the defendants as to values, this court is bound to accept the testimony of the plaintiff's expert witnesses and allow the amounts testified by such experts, and cites Ohio Utilities Co. v. Public Utilities Commission of Ohio, decided by the United States Supreme Court, March 2, 1925, 267 U. S. 359. * * * But that case does not seem to be in point, because in that case there was a valuation by the engineers of the Commission, which was acquiesced in by the Company, and no substantial evidence was found in the record to the contrary.

In the case at bar, while the defendants called no expert witnesses, they did cross-examine the plaintiff's experts, and the court has a right to consider the testimony given in the light of the cross-examination, and accord to it such weight as it deems proper. Head v. Hargrave, 105 U. S. 45; The Conqueror, 166 U. S. 110."

In *Chesapeake and Potomac Telephone Company v. Whitman*, 3 Fed. (2d) 938, the statutory court for the District of Maryland had before it expert testimony offered on behalf of the Company supporting a return of 8 per cent. The Court, speaking through Circuit Judge Rose, declined to accept their opinions and allowed a return of 6 per cent.

Now the expert testimony of the Company was presented from three distinct points of view and from each point of view a claim was made that a return of less than 8 per cent. would be confiscatory.

(1) The first hypothesis put to witnesses was this:

> "Q. If investors were going to buy or build a property like this Company, what amount would they feel, in your opinion, that the property should earn in order to induce them to invest their money in the purchase or construction of such a property?
>
> A. I should think that they would have to have an expectation of at least 8 per cent. to induce them to make the purchase or contract (construct) the property" (R. 535, 1255, 1312).

In this question and answer it is obvious that what was being discussed was an investment to reproduce this *identical plant* of this Company with all its defects in planning, obsolescence and other disadvantages. This was not evidence that 8 per cent. return would be essential to bring forth an investment in a modern up-to-date plant which could render equivalent service.

The evidence of Mr. Hoyt was the most detailed and it will be examined as typical. Our contention is that his conclusion is based on assumptions which are contrary to fact and which, even if founded on fact, do not follow from his premises.

He assumes that as of the date of his testimony bankers or investors could not be induced to supply the necessary money to construct a plant like that of the Company unless they were permitted to receive a return thereon of at least 8 per cent. If this assumption is true, he says, then it follows that, unless the existing company is

permitted to earn a return of 8 per cent. on the value of its property, there would be a discrimination against the capital already invested therein. In other words, if the community could not provide a substitute service without allowing a return of 8 per cent. then less than that return would be unfair to the existing Company, on the value of its existing plant. But this conclusion rests upon the assumption that the new investors would in fact build a new plant like the existing plant at a cost equal to the valuation of the existing plant for the purpose of providing the identical service. We submit that such an assumption is contrary to the fact. The real question now being discussed is whether the rates of fare fixed by the Commission and resulting, as it found, in a rate of return of 6.26 per cent. are confiscatory or not; and if a new substitute company furnishing equivalent transportation service could at the same rate of fare earn sufficient to obtain a return equal to that claimed to be reasonable by Mr. Hoyt, there is no apparent reason why the existing Company should be allowed a higher rate of fare and a higher return. The present Company was formed in 1899 and then and for many years thereafter enjoyed a complete monopoly. For some years its business showed a yearly increase; since 1920 it has shown a yearly decline. Though protected by law from independent motor bus competition, it is subject to the competition of the private automobile. In consequence the commercial possibilities (i. e., what the Compan *can* earn) are less than in the past and are diminishing. Thus, the chief element that gives value to such a property is less potent. Certainly the projectors of any new street railway plant would consider these facts. If they built at all, they would not expend more money than the traffic justified. That is to say, a new plant would cost less than the value found for the old and the same

or much better service could be supplied at the same rate of fare with a consequent higher rate of return on the investment. In addition, it cannot be assumed that there has been no progress in the street railway art. A new plant therefore would be better planned with reference to present conditions, more economically constructed and would have more modern equapment. In other words, an equal or better substitute service could be supplied at the same rates of fare. If this is true and a new plant could earn a greater return at the same rates of fare, than the existing plant, it is difficult to see on what theory, either economic or legal, this Company can support its claim to charge a higher rate.

Now, apart from this, if in fact new street railway plants such as the plant of this Company were being built or bought, there would be some data on which an opinion could be based as to the rate of return required by investors, but no such companies are now being built or bought (R. 1146-1147).

(2) Mr. Hoyt further gave it as his opinion (R. 1256) that the lowest rate of return such a Company as this should be permitted to earn on the value of its property in order to make that return equal to that generally being made at the same time and in the same general part of the country on investments in other business enterprises attended by corresponding risks and uncertainties would have to be 8 per cent. This testimony was given in the Gas Company case on *April 19, 1926*. The witness gave no specific instances of any companies, whether gas companies, electric light companies, or street railway companies, that were in fact earning such a rate of return on the date in question. Mr. Nash, a Company witness, testifying in *1927*, stated that comparatively few

street railway companies were earning 6 per cent. Mr. Downs, of Day and Zimmerman, testified that his organization managed eight or ten electric railway companies in cities such as York, Scranton and Altoona, Pennsylvania, and Zanesville and Lima, Ohio, and that the highest rate of return on any of them was about three per cent. (R. 864).

People's Counsel Exhibit No. 25 (R. 1517) shows that of eleven large cities in the United States comparable to Baltimore, charging cash fares ranging from five to ten cents and token fares ranging from six and one-half to eight and one-third cents, all were earning less than 6 per cent., except Chicago, which was earning 6.27 per cent. in 1927. The Boston company's rate of return was 4.64 per cent. on a rate base representing the total investment in physical property with a flat ten cent fare, four tokens for 25 cents. Mr. Wolf, chief engineer for the Commission (R. 893), testified that the base column in this exhibit was made up to show the minimum rate base which according to the available information the Commission having jurisdiction would have placed on the property.

In the court below the Company challenged the relevancy of this comparison mainly on the ground that for it to have any weight the specific facts in regard to each individual company would have to be known and this would involve making the same inquiry concerning each city which is now being made concerning Baltimore. It is not perceived why the same criticism, if valid in this instance, would not be equally valid in regard to any other utility companies whatever. We submit that other street railway companies not only are business undertakings which are attended by risks corresponding to the

risks this Company is subjected to, but are in fact *the* business undertakings furnishing the truest basis for comparison. According to the rule of the *Bluefield Case, supra,* what a utility is entitled to by way of return is a sum equal to that generally being *made* at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties. Hence the experience of a gas company or electric light company may be relevant, unless indeed such companies have become highly profitable enterprises. Other street railway companies could only be *excluded* from consideration on the assumption that their properties were in 1927 suffering confiscation through unconstitutional action of commissions. The evidence in the record justifies this statement in the opinion of the Commission (R. 37-38):

> "Witnesses for the Company (Messrs. Hoyt, Burroughs and Fenhagen) testified that an 8 per cent. return would be necessary to get capital to invest in street railway properties, but none of them showed that any street railway company did or could earn that rate. As a matter of fact, none of them do. Therefore, according to the testimony it is not possible to get capital, not only for the United Railways but for any street railway in the country. Yet we do know that capital *is* forthcoming at fair rates of interest for well managed street railway companies which are giving adequate service to the public at reasonable rates, even if those rates do not yield 8 per cent. It may be true, however, that capital could not be obtained for the establishment of a complete new railway system anywhere in this country."

In *Chesapeake and Potomac Telephone Company v. Whitman, supra,* Circuit Judge Rose said at page 954:

> "According to the table submitted on its behalf, its net earnings have almost always fallen somewhat

short of 6 per cent. and yet it has not only lived but it has been able to raise many millions for the expansion of its facilities and the promotion of its business."

The situation of the steam railroads of the country is in many respects analogous to that of a street railway in a City such as Baltimore. Both are subject to competition from transportation agencies other than other railroad companies. The steam railroads are in competition with water lines and with motors; the street railways with the private automobile. See dissenting opinion of Justice BRANDIES in *St. Louis and O'Fallon R. Co. v. U. S.*, 73 L. Ed. 457-471-474.

As shown at page 471, note 29, of this same opinion, the rate of return calculated an Ex Parte 74 (Re Increased Rates 1920, 58 Inter. Com. Com., Report 220) value of the railroads as a whole brought down to date, was:

	1921	1922	1923	1924	1925	1926	1927	1928
Per cent.:	3.2	4.0	5.1	4.9	5.5	5.8	5.1	5.5

Notwithstanding this competition and this low rate of return the Interstate Commerce Commission found, as stated by Justice BRANDEIS in the same case, at page 469:

"During the period 1920-1926, inclusive, the investment in railroad property increased by 4 billions of dollars. A substantial part of this money was derived from income but much of it was obtained by the sale of new securities. The market for railroad securities since the passage of the Transportation Act, 1920, has steadily improved and the general trend of interest rates has been downward. The credit of the railroads in general is now excellent."

(3) Mr. Hoyt was further interrogated as to the rate of return required to secure proper credit for financing.

Apparently this evidence was designed to comply with what may be called the second rule laid down in the *Bluefield Case, supra,* as follows:

> "The return should be reasonably sufficient to insure confidence in the financial soundness of the utility, and should be adequate under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties."

The actual question put to Mr. Hoyt embraced somewhat different elements. It was as follows (R. 1255):

"Q. Taking into consideration other classes of investment, with the comparative risks and return thereon, the rate of return generally required to secure proper credit for borrowing money and financing its operations, what should such a company as this Company be permitted to earn in order that it might compete successfully with other business and be on a parity with them, in your opinion?

A. I think the return should be 8 per cent. in order to permit it to compete with other lines of industry for capital."

Now, obviously, if this Company did in the past create a situation which now adversely affects its credit, it cannot demand a rate of return high enough to pay investors the abnormal rates for money which they would necessarily exact. That is to say, whereas the Company is entitled to collect, if it can, its necessary costs (including the cost of money), it cannot be heard to say that its property is confiscated unless it be permitted to earn costs rendered abnormally high by its own financial structure. In 1899 its ratio of debt to total capitalization was approximately 68 per cent. Some twenty-eight years

later the Commission fixed the value of the total property of the Company at $75,000,000. As of the same date the Company had outstanding (including its notes) $67,176,200 in securities representing funded debt and $20,461,200 of stock. Therefore, these securities at par exceeded the value of the property as fixed by the Commission by $12,637,400, and the ratio of funded debt to total capitalization was approximately 76 per cent. and the ratio of funded debt to the value of the property, as found by the Commission, was approximately 90 per cent. (R. 27).

Commenting on this the Court said (R. 1641):

> "And it is quite as reasonable to assume that the fact that the ratio of the Company's funded debt to the value of its property is, as the Commission found, approximately 90 per cent. affects its credit, as the fact that it can only earn 6.26 on the value of its property."

That the Company has an unbalanced financial structure was admitted by Mr. Hoyt (R. 534) and is self-evident. To be properly financed a street railway company should have no more than 60 per cent. in bonds and 40 per cent. in stocks, either preferred or common (Fenhagen, R. 1145). It is not surprising, therefore, that the Company had to pay for borrowed money from 1920 to 1927 prices shown on its Exhibit No. 31 (R. 1462). As shown by this table, cost of long term bonds in 1922 was 6.75 per cent. and on other long term bonds in 1924, 6.93 per cent.; and on short term notes in 1927, 7.32 per cent. Over the same period of time the weighted and simple average yields at offering price of new public utility securities issued had steadily gone down from 7.55 per cent. in 1920 to 5.24 per cent. in 1927, and from 7.64 per cent. in 1920 to 5.61 per cent. in 1927, respectively. (See Ap-

pendix to Brief, page 154, where a table taken from the Journal of Land and Public Utility Economics, May 19, 1928, is set out.) And the average weighted interest rate of securities (not including stocks, R. 972), authorized by the Maryland Public Service Commission to be issued decreased from 6.33 per cent. in 1921 to 5.12 per cent in 1926 (People's Counsel Exhibit No. 51, R. 1594). See People's Counsel Exhibit No. 6 (R. 1475) being a table of securities issued by the Company from 1911 to July, 1927. See also People's Counsel Exhibit No. 49 (R. 1592), showing average rate of interest on indebtedness of Company at September 30, 1927.

From 1920 to 1926, both inclusive, the return earned by this Company on its property at the valuation figure of $75,000,000 adjusted for the years in question was as follows (See Appendix to Brief, page 147):

For the calender year	1920	5.579%
	1921	4.987%
	1922	5.331%
	1923	5.469%
	1924	5.469%
	1925	5.621%
	1926	5.671%

This return compares very favorably with that shown by the street railway companies in eleven large cities of the United States (People's Counsel Exhibit No. 25, R. 1517), and is substantially higher than the return earned by the steam railroads of the country during the years 1921 to 1927 (See figures, supra, page 9). The situation of this Company, therefore, was that with a rate of return for the years 1920 to 1926, inclusive, substantially higher than that of the steam railroads of the country and comparing favorably with that earned by other street rail-

ways in 1927 and with interest rates as shown by the yields on new public utility security issues steadily falling during the period 1920 to 1927, and as likewise shown by the average interest rates of securities authorized to be issued by the Maryland Public Service Commission steadily falling, this Company paid more for borrowed money in 1927 than it did in 1922. It would appear from this that whatever *general* causes may have been affecting the cost of money to street railway companies in 1927, there was a *special* cause affecting the credit of this Company, i. e. the nature of its financial structure.

Mr. Hoyt said that the endeavor of the Company should be, whenever its credit permitted it to do so, to finance by issuing stock in order to improve the ratio of equity securities to those bearing fixed charges (R. 534), and he suggested that if the Company were compelled to pass its dividend the likelihood of its doing preferred stock financing would be rendered extremely remote. *He did not state that if the Company were allowed to earn and pay its dividend any preferred stock financing would in fact have been feasible.* In order to alter the capitalization of the Company so that only 60 per cent. would be represented by bonds and 40 per cent. by stock would require a reduction in bonds from $67,000,000 to $52,000,000, and an increase in stock from $20,000,000 to $35,000,000, i. e. $15,000,000 of debt would have to be liquidated by the sale of stock.

Mr. Hoyt further expressed his opinion (R. 1290-1291) that the average utility company of good credit earned its fixed charges from two and one-half to three times. Applying this rule to the case at bar we find that this Company's passenger revenue would have to be $23,219,000 to earn which a base fare of 11.52 cents

would have to be charged. According to the Company's estimate (Exhibit 24, R. 1428) the 10 cents flat fare asked by it would have yielded in 1928 passenger revenue of $20,156,000. (See Appendix to this Brief, page 145).

(4) The decisions of this Court emphasize that what is a fair rate of return must be determined with relation to all relevant circumstances existing as of the date of the inquiry:

> "A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally."
>
> *Bluefield W. W. etc. v. Public Service Commission*, 262 U. S. 679, 693.

This Court will take judicial notice that these factors may change either up or down in a very brief time.

In *Lincoln Gas Company v. Lincoln*, 250 U. S. 256, it was said at page 268:

> "It is a matter of common knowledge that, owing principally to the world war, the costs of labor and supplies of every kind have greatly advanced since the ordinance adopted, and largely since this cause was last heard in the court below, and it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities *a few years ago* furnishes no safe criterion for the present or for the future." (Italics supplied.)

This was said in 1919. The evidence already cited shows that financing costs of public utilities in general

reached their peak about 1920, and steadily declined thereafter to and through the year 1927, the date of the hearing. It would seem that this trend would have to be taken into account by expert witnesses, such as those with whose testimony we have been dealing and that would necessarily find some reflection in their estimates of a fair rate of return. Mr. Hoyt and Mr. Burroughs testifying May 27, 1925, in the Valuation Case as to conditions *January 1, 1924,* said 8 per cent. was fair; Mr. Hoyt testifying *April 19, 1926,* in the Gas Company Rate Case said 8 per cent. was fair, and finally testifying in *September, 1927,* in the present case, again said that 8 per cent. was fair. In other words, over a period of three years and nine months (January 1, 1924, to September, 1927), no effect whatever was given to material changes which did in fact take place in conditions which this Court has held must be considered in arriving at the rate of return.

During the period in question the prices of capital were as follows (See Appendix to this Brief, Schedule F, page 153):

Year	Municipal Bonds	R. R. Bonds	P. U. Bonds	Indus. Bonds	Indus. Pfds.	Foreign Govt's	Price of Capital
1924 1st quarter	4.39%	5.21%	6.31%	6.55%	7.32%	6.39%	6.08%
1924 2nd "	4.29	5.47	6.20	6.68	7.14	6.40	5.98
1924 3rd "	4.24	5.20	6.11	6.30	6.92	6.59	5.86
1924 4th "	4.17	5.00	5.91	6.36	6.99	7.03	5.78
1925 1st "	4.00	5.17	5.77	6.24	7.26	7.18	5.77
1925 2nd "	4.00	5.45	5.70	6.33	7.19	6.81	5.82
1925 3rd "	4.17	5.37	5.38	6.06	6.63	6.68	5.79
1925 4th "	4.30	5.09	5.82	6.11	7.06	7.30	5.82
1926 1st "	4.25	5.13	5.80	5.88	6.76	7.26	5.77
1926 2nd "	4.22	4.83	5.46	6.15	7.25	6.85	5.70
1926 3rd "	4.21	5.11	5.71	5.93	6.96	6.78	5.76
1926 4th "	4.36	5.09	5.51	5.68	6.59	7.04	5.74
1927 1st "	4.25	4.91	5.41	5.70	6.52	6.47	5.60
1927 2nd "	4.06	4.86	5.48	5.75	6.53	6.47	5.51
1927 3rd "	4.11	5.04	5.30	5.93	6.46	6.15	5.50

From 1924 to 1927 the United States Bureau of Labor Statistics Index for all Commodities Wholesale, the

datum being taken as 100 in 1913, fell from 150 to 146 (People's Counsel Exhibit No. 23, R. 1510).

Summarizing, we submit that though the expert testimony was not directly contradicted by any expert witness of the Commission, nevertheless the Commission was justified, as was the Court of Appeals, in giving it little, if any, weight. Its inherent weight was negligible.

The Rate of Return on the Value of the Property of Steam Railroads Fixed by Congress by the Transportation Act of 1920 as Reasonable May Be Lower than the Rate Fixed by the Commission in This Case.

If this Company had been an interstate steam railroad, it would have been required by the terms of the Transportation Act of 1920 to place one-half of its earnings in excess of 6 per cent. in a reserve fund and pay the remaining one-half to the Interstate Commerce Commission for the purpose of establishing and maintaining a general railroad contingent fund. By these provisions Congress has thus affirmed that for steam railroads engaged in interstate commerce a return of less than that allowed in this case is a fair return. Of course, if a railroad can earn say 8 per cent., one-half of the excess over 6 per cent. would be held by it in the reserve fund and used by it in accordance with the Act. In other words, whereas the operation of the Act does not necessarily prevent a railroad from earning more than 6 per cent., it may so operate in certain instances as that the net return to the Company will be only a very small fraction above 6 per cent. (See Section 15a, pars. 1, 2, 3, 4, 5, 6, 7 and 8, of the Transportation Act of 1920, 41 Stat. at L. 488). Furthermore, par. 3 provides that a return of 5½ per cent. with the addition there to of ½ per cent. in the

discretion of the Interstate Commerce Commission shall be taken as a fair return during the two years beginning March 1, 1920.

The constitutional validity of these sections has never come before this Court in a case where their application would limit the carier to a return of a small fraction over 6 per cent. In *Dayton-Goose Creek R. Co. v. U. S.*, 263 U. S. 456, the return which the carirer received after compliance with the law was about 8 per cent. on the reported value, so that the question here involved was not determined. Nevertheless the Court expressed its opinion on the subject in what at least was a strong dictum as follows, page 486:

> "The act fixes the fair return for the years here involved, 1920 and 1921, at 5½ per cent., and the Commission exercises its discretion to add one-half a per cent. The case of *Bluefield Water Works & Improv. Co. v. Public Serv. Commission*, 262 U. S. 679, is cited to show that a return of 6 per cent. on the property of a public utility is confiscatory. But 6 per cent. was not found confiscatory in *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 48, 50; in *Cedar Rapids Gas Light Co. v. Cedar Rapids*, 223 U. S. 655, 670; or in *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153. Thus the question of the minimum of a fair percentage of value is shown to vary with the circumstances. Here we are relieved from considering the line between a fair return and confiscation because, under the provisions of the act and the reports made by the appellant, the return which it will receive, after paying one-half the excess to the Commission, will be about 8 per cent. on the reported value. This can hardly be called confiscatory."

In *St. Louis & O'Fallon R. Co. v. U. S.*, 73 L. ed. 457, this Court did not consider what rate of return the carrier was actually earning on the basis of the value fixed.

The fundamental question involved was not the question of confiscation but rather whether the Commission had acted as directed by Congress. However, it appears from the dissenting opinion that on the carrier's own estimate of value it was earning about 8 per cent.

But the *O'Fallon Case* does hold that the Transportation Act for the purposes in qustion directed that values should be fixed upon the consideration of present cost along with all other pertinent facts. In the case at bar, the Public Service Commission fixed the value of the Company's property upon the consideration of present cost and excluded all other considerations. If in the *O'Fallon Case* the Interstate Commerce Commission had followed the valuation rule which the Public Service Commission in this case did in fact follow, the question of constitutionality would necessarily have been involved if the rate of return had not exceeded, as here, 6.26 per cent. As we have said, this question was not decided in either the *O'Fallon* or the *Goose Creek* cases, but in the latter it was strongly intimated that a return of say 6.26 per cent. was not in itself confiscatory, but that the question of the minimum of a fair percentage of value varies with the circumstances. In any event Congress has as to the steam railroads given the strongest sort of legislative sanction to the proposition that a return of not less than 5½ per cent. nor more than 6 per cent. during the period of two years beginning March 1, 1920, and a possible return thereafter of only a small fraction above 6 per cent. is sufficiently above the limit of confiscation as to constitute a "fair return." It remains to consider what relation this legislative standard has to the situation of a local street railway.

The steam railroads are subject to competition among themselves. One purpose of the Transportation Act of

1920 was to do away with some of the economic effects of this. The street railway Company in this case suffers no such competition. The Maryland Commission under the law has power, which it has exercised, to protect this Company against "jitney" competition, so that no public automobile busses compete with the Company. It does, however, compete with the private automobile, which neither the Commission nor any other public agency in Baltimore has power to control in this respect. The steam railroads of the country, on the other hand, suffer from the competition not only of the private automobile but of automobile lines operating as common carriers. Likewise they must meet cmpetition from water borne traffic and this latter form of competition has been fostered by the Government. Despite these facts it is clear that Congress concluded that a minimum return of a fraction over 6 per cent. would not be confiscatory. It must be presumed that this was done with full knowledge that the credit of the railroads must have been affected by the fact that as a whole they had been earning substantially less. Furthermore the Act has a uniform application and therefore applies to any individual railroad no matter how seriously its financial structure might affect the cost to it of necessary money. Nor does the Act require the Interstate Commerce Commission, as a pre-requisite to a recapture order, to establish a general level of rates upon the aggregate value of carrier property either as a whole or in some prescribed rate or territorial group. Such a position was taken by the railroad in the *O'Fallon* case, but was overruled by this Court. The Court said (73 L. ed. at 460):

> "Also we think the District Court rightly rejected the claim that excess earnings were not recapturable unless and until the Commission had fixed a general level of rates intended to yield a fair return upon

the aggregate value of carrier property either as a whole or in some prescribed rate or territorial group."

In consequence it is possible for the Interstate Commerce Commission so to fix the rates of an individual carrier that they will yield to the carrier a return of only a small fraction about 6 per cent. Finally, Congress must be taken to have known that all railroads, and particularly the weak railroads, were under the necessity (just as this Company) of competing for capital with other industries yielding much higher returns. It can not be forgotten that capital, like other commodities, must be sold or utilized so as to realize its value and that neither the whole available supply of any commodity, capital included, can always command the highest price. In other words, there is a high priced market for capital which will absorb a certain proportion of the available supply, and the remainder must seek the lower priced market or remain unemployed.

The Authorities.

The most recent cases show a strong tendency to approve rates of return lower than the rates held reasonable during the period following the World War. Mr. Justice BRANDEIS, delivering the opinion of the Court in *Galveston Electric Co. v. Galveston*, 258 U. S. 388, decided in 1922, referring to an ordinance passed June 5, 1919, fixing the rate of fare for a street railway company, said at page 402: "But nearly three years have elapsed since the Board adopted the ordinance; and more than a year since entry of the decree below. We know judicially that the period has, in general, been one of continuous price recession, and that the current rates of return on capital are much lower than they then were."

In *Greencastle Water Works v. Public Service Commission of Indiana,* 31 Fed. (2d) 600, the statutory court for the Southern District of Indiana decided on March 18, 1929, that a return of 6½ per cent. was not confiscatory. The Commission had fixed the fair value of the company's property at $300,000. Stone and Webster, for the company, estimated a value of $594,200. The court fixed a value of not less than $350,000. It said, page 606:

> "Having determined that the fair value of the plaintiff's property, as found by the Commission, is inadequate, this court, upon all the evidence, finds the fair value of such property to be no less than $350,000, and that a return of 6½ per cent. on that amount, after providing for all proper operating expenses including amortization of the rate case expenses over a period of five years, taxes, and depreciation at the rate of 1 per cent. per annum on the book value of its depreciable property, will not be confiscatory."

In *Cambridge Electric Light Co. v. Atwill,* 25 Fed. (2d) 485, the statutory court for the district of Massachusetts on April 11, 1928, refused to hold that a return of less than 8 per cent. would *ipso facto* be confiscatory. The case was an application for an injunction *pendente lite,* to restrain the Public Utilities Department of Massachusetts from enforcing an order requiring the plaintiff to make material reductions in its rate for domestic and commercial lighting. The application was refused and the case referred to a special master to take the testimony. The Department had held that the earnings under the new rates would be more than sufficient to pay 6 per cent. on the valuation and stated that such a return is "'very attractive' in Massachusetts for securities of this sort." The Court said at page 487:

"As to the rate of return: on this point also the Department had before it, as we understand, substantially the same evidence as is before us, viz., that the rate of return should be 8%. This evidence was rejected, and the Department adopted, as stated in its decision, a rate of 6%. This also is primarily a question of fact depending upon a number of factors. What would be a fair return for a company in one locality at a certain period might be inadequate or excessive for other companies differently situated. The rate of interest has also to be taken into consideration. *Bluefield Co. v. Public Service Commission*, 262 U. S. 679. On the plaintiff's own figures it will get a return under the new rate of about 5 per cent. on its valuation. On the figures of the Department its return will be about 7 per cent. We are not at present satisfied that a return of less than 8 per cent. would *ipso facto* be confiscatory, or that the return which the plaintiff will actually obtain under the new rate will be of that character. These points should await final hearing and possibly the results of actual experience."

One of the circumstances to be taken into consideration is *locality*. Conditions in Virginia are similar to those in Maryland.

On January 20, 1927, the Supreme Court of Appeals of Virginia, in *C. & P. Tel. Co. v. Virginia*, 147 Va. 43, substituted a 6 per cent. rate of return for a 6½ per cent. rate of return fixed by the Virginia Commission. The Court said (pages 82-84):

"It is argued for the appellant Company that it is unquestionably entitled to 8 per cent. return upon the rate base. If so, its owners have an assurance which cannot be given to any investor in private enenterprises. We do not construe the decisions of the Supreme Court of the United States to afford any such guaranty. There have been many cases in which smaller returns have been held sufficient. * * * Re-

ferring to the provisions of the Federal Transportation Act as to railroad earnings, Mr. Chief Justice TAFT recently said: 'By investment in a business dedicated to the public service the owner must recognize that as compared with investments in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profit.' *Dayton-Goose Creek Railroad Co. v. U. S.*, 263 U. S. 456. * * * While much is said for the appellant of the appreciation of labor and material costs at this time, little has been said about the decreasing returns upon investments. Most of the cases in which a rate of return greater than 6 per cent. has been approved were decided since 1918 and while interest rates were high. In this case it is proved, and is a matter of common knowledge, that the rates for money when this case was decided were rapidly approaching normal rates. They are still decreasing, and corporations of sound financial credit can readily float their securities at greatly reduced rates. The high rate of return required a few years ago to attract capital to sound enterprises is no longer necessary. So that it seems to us perfectly certain that even if there were no other benefits a 6 per cent. return upon the fair vlaue of a property such as this cannot be held to be confiscatory. The risk is slight because of the fact that the revenues are quite fixed and certain, and the business is one which is not greatly affected by market fluctuations. We find in this record no reason for holding as to this Company that the rates prescribed will fail to yield a just and reasonable return, when all the relevant facts are accorded proper weight."

On February 27, 1925, Circuit Judge Rose delivering the opinion of the statutory court for the District of Maryland, composed of himself and District Judges Groner and Soper, in *Chesapeake & Potomac Telephone Co. v. Whitman*, 3 Fed. (2d) 938, held that a 6 per cent. return on the value of the property of the Telephone

Company operating in the City of Baltimore and the State of Maryland was sufficient. At pages 953-954 he said:

"The Company says it is entitled to a return which would yield it 8 per cent. on the fair present value of its propery used and useful in the service of the public. There is at least one recent opinion from a distinguished court which so holds. New York Telephone Co. v. Prendergast (supra). A history of the present controversy seems, however, to show that the Company makes that contention here principally as a second line of defense, behind which it may shelter itself in the event that the valuation it puts upon its proyperty is too largely reduced. It claims that its plant is worth upwards of $38,000,000, even after allowance has been made for depreciation; 8 per cent. on that sum would be $3,064,000. The rates which it would have put in force, had the Commission permitted it to do so, would, it calculates, yield it a net revenue not much over two-thirds of that sum, or less than 6 per cent. on what it claims to be a fair value of its property. It offered the testimony of several investment bankers of wide experience, high character, and great ability. They agreed that, in order to insure that a public utility of the character of the Company should be able on occasion to get the new capital necessary for a constantly expanding business, it must be able to show earnings of at least 8 per cent. on the money invested. Two of these witnesses based this conclusion on the view that, in order to secure additional investmen, the utility must be earning more than it spends or distributes; in other words, that its surplus and undivided profits must steadily increase. They thought that the minimum sum which should annually be added to these accounts was 2 per cent.

"They may be right in their judgment, as to the difficulty of getting people to put their money into a company which is not improving its financial position. We have no reason to suppose that they are not. It may be that the public is even more inter-

ested in good service than it is in what that service would cost within reasonable bounds. If, so, Legislatures and Commissions may wisely give great weight to the considerations so forcibly urged by these banking witnesses. *Nevertheless we take it to be clear that to deny to a utility the opportunity constantly to add to the value of its property out of the rates paid by the public is not confiscation.* If the present Company stood alone, either in the sense that it had, unaided, to look after its own financing, or that it did not form what is in reality an integral part of a nation-wide system we might well doubt whether a return of 6 per cent. would be sufficient to enable it to raise the money necessary to its growth, and therefore, it may be, to its life; but such is not the case. It is owned and altogether controlled by The Ameriman Telephone & Telegraph Company, hereinafter styled the National Company. In partial return for a substantial annual sum paid by it to the National Company, the latter has agreed to assist it in its financing. *According to the table submitted on its behalf, its net earnings have almost always fallen somewhat short of 6 per cent., and yet it has not only lived, but it has been able to raise many millions for the expansion of its facilities and the promotion of its business.* It is not for us to pass upon questions of policy. It may well be, as the Commission itself in 1916 thought, that the Company should be permitted to earn as much as 8 per cent., if it could. *All that we hold is that, if the Company be allowed as much as 6 per cent., its property has not been confiscated.* On the other hand, on this record, we are convinced that an enforced schedule of rates, which would make such minimum earning impossible, is in legal effect to take from the Company its property without just compensation therefor."

If the weight of this decision is affected by the fact that the local company had a contract with the national company whereby the national company, in consideration

of payments to it, rendered various services, including assistance in its financing, to the local company; if, in other words, the 6 per cent. return to the local company was subject to very little, if any, deductions for financing costs since these had already been paid (in what amount it is impossible from the opinion to say) under the contract referred to, there are counter-balancing facts. In the case at bar the return is higher. Further, the Court refused to adopt as applicable to Baltimore or Maryland the New York rule laid down in *New York Telephone Co. v. Prendergast,* 300 Fed. 822, approving an 8 per cent. return, and lastly, the case was decided in 1925, whereas the Commission's decision in the case at bar was some two years later when interest rates were lower.

In the Court below the Company relied strongly on a series of cases dealing (with one exception, a telephone company) with gas companies, located in or near New York City, wherein returns of 8 per cent. were allowed. The period of time embraced in these decisions was from 1924 to 1926.

See:

New York & Queens Gas Co. v. Prendergast, 1 Fed. (2d) 351 (June 16, 1924) (Appeal dismissed 268 U. S. 708).

Consolidated Gas Co. of N. Y. v. Prendergast, 6 Fed. (2d) 243 (April 22, 1925) (Affirmed in Ottinger v. Consolidated Gas Co., 272 U. S. 576, Nov. 29, 1926).

Kings County Lighting Co. v. Prendergast, 7 Fed. (2d) 192, (June 30, 1925) (Modified and affirmed in Ottinger v. Brooklyn Union, 272 U. S. 579, Nov. 29, 1926).

Brooklyn Union Gas Co. v. Prendergast, 7 Fed. (2d) 628, (June 24, 1925) (Modified and affirmed in Ottinger v. Brooklyn Union, 272 U. S. 579, November 29, 1926).

New York & Richmond Gas Co. v. Prendergast, 10 Fed. (2d) 167 (December 18, 1925).

New York Telephone Co. v. Prendergast, 11 Fed. (2d) 162 (March 10, 1926).

In most, if not all, of these cases the companies produced experts to testify according to the same formulas adopted by the Company's expert witnesses in this case. Indeed, one of the witnesses for the plaintiff in this case (Mr. Hoyt) also testified in *Consolidated Gas Co. v. Prendergast*, 6 Fed. (2d) 243, and there, as here, said that a return of 8 per cent. on the present cost of buying or building the property and *even more* would be required to interest capital. In the earliest of these cases, *New York & Queens Gas Co. v. Prendergast*, the Company's witnesses claimed a *10 per cent.* return.

In none of these cases did this Court rule that a return of less than 8 per cent. was *confiscatory*. In *Consolidated Gas Co. v. Prendergast*, 6 Fed. (2d) 243, the special master had found that as of January 15, 1925, 8 per cent. was customarily required in the locality. This finding was approved by the lower court. The question was as to the constitutionality of a state statute fixing the price of gas at a rate which would yield a return of less than 6 per cent. In affirming the decision of the lower Court this Court said in *Ottinger v. Consolidated Gas Co. of N. Y.*, 272 U. S. 576, at 579:

"He, (the Master) concluded that the rate of $1.00 per thousand feet would not yield a return of 6 per

> cent., and was therefore confiscatory. With this conclusion the Court below agreed, and we find nothing whatever suggested by the Attorney-General either in the brief or oral argument which would justify material modification or reversal of the final decree in so far as it adjudges and directs appropriate injunctions."

In *Kings County Lighting Co. v. Prendergast*, 7 Fed. (2d) 192, the Master found that the rate for gas would have yielded to the plaintiff not more than 3½ per cent. and recommended a rate of return of 8 per cent. This was approved by the District Court and that decision was modified and affirmed in *Ottinger v. Brooklyn Union*, 272 U. S. 579, where this Court said, page 581:

> "The statute was clearly confiscatory in effect and there was no necessity for the District Court to consider any other objection thereto."

This Court has laid down no unvarying rule that any specific rate of return is necessary to avoid confiscation. *Dayton-Goose Creek R. R. Co. v. U. S.*, 263 U. S. 456. There are many considerations which were operative in the cases decided by this Court and by the lower Federal Courts which do not appear in the case at bar.

Bluefield W. W. Co. v. P. S. C., 262 U. S. 679, holding that 6 per cent. was substantially too low to constitute just compensation *was decided in 1923.* In *McCardle v. Indianapolis Water Co.*, 272 U. S. 400 (Nov. 22, 1926), a rate of 7 per cent. found by the Commission on November 28, 1923, was sustained against attack, this Court saying, page 419, "the evidence is more than sufficient to sustain the rate of 7 per cent. found by the Commission and recent decisions support a higher rate of return." These decisions, referred to in a foot note to the opinion, *range in date from 1919 to 1925.*

In *Monroe Gas Light & Fuel Co. v. Mich. Public Utilities Commission,* 11 Fed. (2d) 319 (Feb. 27, 1926), the court holding that a return of 7 per cent. would not be confiscatory said, page 325:

> "Under these circumstances we do not attempt to determine what the constitutionally minimum rate would be. Somewhat less than 6 per cent. is doubtless confiscatory, even making some allowance in connection with the corporate income tax."

In *Pacific Tel & Tel. Co. v. Whitcomb,* 12 Fed. (2d) 279, affirmed in *Denny v. Pacific T. & T. Co.,* 48 Sup. Ct. 222, the court in approving a conclusion of the special master that a return of less than 7½ per cent. would be confiscatory, said, page 287:

> "The proper principles, as defined by the Court, were applied, and the figures fixed by him was within the limits marked by the controlling cases. Moreover, this Court is not engaged in the task of fixing rates for public utilities, and, even if it be thought that the rate of return fixed by the special master is excessive, it is obvious that, measured by a substantially lower rate of return, the orders of the department here under review would nevertheless be confiscatory because of the improper rate base adopted by the department."

In *Idaho Power Co. v. Thompson,* 19 Fed. (2d) 547, (April 28, 1927), the Court held that a return of "7 per cent. of over" could not be held to be confiscatory.

In *Southern Bell Telephone Co. v. Railway Commission of S. C.,* 5 Fed. (2d) 77 (April 30, 1925), the court approved the special master's recommendation of 8 per cent. His conclusion was clearly influenced (page 89) by the fact that by statute in South Carolina the legal rate of interest is 7 per cent. with 8 per cent. allowable by

special contract and by the further fact that capital in South Carolina invested in banking, *merchandising* and *other businesses* yields a rate of 8 per cent.

In Maryland the statutory interest rate is 6 per cent. (R. 1645).

The Opinion of the Commission.

The Commission gave its reasons for refusing to allow a rate of return of 8 per cent. We submit that they are sound. But whether sound or not, if its conclusion, based on the evidence, is correct, it will not be disturbed. *Virginian R. Co. v. United States,* 272 U. S. 658, 666.

Answering the contention of the Company to the effect that in none of the cases in which a utility was held entitled to earn a return of 8 per cent. were the risks of the utility business as great as they are now in the street railway business, and that consequently this Company was entitled to earn more than 8 per cent., the Commission in effect pointed out that the application of such a principle would necessarily result in raising fares to a point beyond what the service is worth. The Commission did not, as contended below by the Company, hold that "risk" was not an element to be considered nor that it should as a matter of law limit instead of increase the rate of return necessary. What it did hold was that in fact automobile competition limits the rate that street railway companies can (commercially) earn (R. 38). It reviewed the evidence in the record that comparable street railways in other cities were not earning more than 6 per cent., and considered that the probable reason why they did not appeal to the courts to allow them a greater rate of return was the belief that they could not earn 8 per cent. at rates which the public would pay and

that the effort to get an 8 per cent. return would, through the operation of the law of diminishing returns, result in their earning even less than they are earning now (R. 37). Applying the rule of the *Bluefield Water Case*, 262 U. S. 679, that a utility "is entitled to such rates as will permit it to earn a return on the value of the property—equal to that generally being made at the same time and in the same general part of the county on investments in other business undertakings which are attended by corresponding risks and uncertainties," the Commission found that the only comparable business undertakings "attended by corresponding risks and uncertainties" were other street railway companies in the East. This conclusion was severely criticised by the Company in the Court below, undeservedly, we think. It is well known that gas companies and electric light companies through improvements in the art and increasing patronage are able to earn large profits at *reasonable rates* and from time to time even to make reductions in rates. On the other hand, street railway companies are not extending their plants, their business is not increasing, and this is so not because their rates are too low but because their patronage is diminishing because of automobile competition. These companies, therefore, have fallen into the unprofitable class. In respect of rate of return no one would contend that they are entitled to earn amounts equivalent to those made by highly profitable or speculative undertakings, but at the present time gas and electric companies are certainly in the highly profitable class. The risk which the authorities say must be taken into consideration must be the risk of the business under consideration and not the risk of some other business where a high return on capital is demanded and received. It would not be in accordance with the rule of the authorities, we submit, to compare a steam rail-

road with a gas company, but it would be in accordance with the rule to compare one steam railroad with others. It is true that competition as it exists in the case of street railway companies constitutes a risk; strictly commercial undertakings are subject to a like risk; but a street railway company collects its fares in cash; what patronage it commands is subject to but slight seasonal fluctuations and generally, as here, it is protected so far as legally possible in its monopoly.

In conclusion the Commission was entitled on this question of the fairness of the return to take into consideration the fact that a deduction had been allowed for the federal corporate income tax. In *Galveston Electric Co. v. Galveston,* 258 U. S. 388, this court said at page 399-400: "But the fact that it is the Federal corporate income tax for which deduction is made must be taken into consideration in determining what rate of return shall be deemed fair. For, under paragraph 216, the stockholder does not include in the income on which the normal federal tax is payable dividends received from the corporation. This tax exemption is therefore, in effect, part of the return on the investment." And again, in *Georgia Railway & Power Co. v. R. R. Commission,* 262 U. S. 625, at 633, this Court, speaking in 1923, said "the probable return based on the value of the probable income found by the Commission would be nearly 7¼ per cent. It must be borne in mind, as pointed out in *Galveston Electric Co. v. Galveston, supra,* that, since dividends from the corporation are not included in the income on which the normal Federal tax is payable by stockholders, the tax exemption is, in effect, an additional return on the investment. A return of 7¼ per cent.—in addition to this tax exemption—cannot be deemed confiscatory."

IV.

Rates Must Not Exceed the Value of the Service to the Public. The Company Has Failed to Show that a Further Increase in the Rates of Fare Would Not Be, Under the Circumstances, Unreasonable to the Public.

The street railway industry throughout the country is in rapid process of at least partial supersessison by the public and private automobile and bus, but particularly by the private automobile. This was established by evidence produced by the Company. The business is now a competitive one,—the natural monopoly feature usually characteristic of utilities is absent. It is competitive with walking, on short hauls, and with public and private automobile operation on all business.

Hundreds of miles of interurban lines have been abandoned in the last few years. In smaller cities and communities, the urban street railway system has yielded to bus operation.

In the larger cities, the companies have been protected by regulatory bodies against public automotive competition. But, as the commissions themselves have realized and stated, they are helpless to prevent the inroads into patronage made by the private automobile. They can not regulate personal tastes and preferences, or the expenditures of private funds.

Street railway systems generally, like that of the Company, are the result of consolidations of competing lines, built before the days of regulation, and without reference to the actual needs of the public (R. 40). They represent heavy investments in duplicated service. When the passenger trend was upward, this was of

little consequence. Now that it is downward, a fair return on these investments can not be earned at reasonable rates.

The seriousness of the menace of this competitive situation to the future of the street railway industry is not denied or minimized by the Company. On the contrary, its president fully conceded the danger, and relied upon it as a major basis for relief. Passengers, admittedly were falling off at the rate of from three or five per cent. a year, primarily because of automobile competition, when the case was heard. Counsel for the Company referred to present-day street-car service, in their brief before the Commission, as a "break-down" service for the 25 per cent. of the public who did not use the cars regularly, and a "stand-by" service for the 75 per cent. of the public who did.

In the early part of 1927, the street cars in Baltimore were said by Company witnesses to have been carrying 75 per cent. of the travelling public (R. 670). The president of the Company estimated a minimum decline in passengers for 1927 and 1928 of 3 per cent. per annum, with a probable decline of 5 per cent. in 1928 under a ten cent fare (R. 661).

Meanwhile the automobile saturation point is not in sight (R. 694). Price reductions are general in the motor field, and vigorous competitive sales campaigns are in progress. Similar competitive conditions among finance companies, coupled with large amounts of idle capital, have brought about a condition where virtually anyone, regardless of earning power or financial responsibility, can own an automobile. Frequent repossessions do not seem to dull the ardor of the finance com-

panies, or their willingness to underwrite the purchase of a new car for an owner who has failed to pay for his old one.

This situation has materially affected the earnings of the street railway industry, both actual and potential. Until 1920, the normal increase in population in Baltimore afforded this Company an annual increase in passengers of five per cent. Since then, with the increasing vogue of the automobile, the trend has been steadily downward. All over the country, street railway fares are being fixed, by regulatory bodies and by the companies themselves, with full appreciation of the value of the service to the remaining part of the public that still uses the cars.

Mr. Hoyt, a Vice-President of the National City Company, a witness produced by the Company, recognized this fact in his testimony before the Commission in a previous case (R. 1275). He had testified that eight per cent. was the return necessary to attract capital to a business. The following ensued:

> "Q. Do you think then that the same rate of return should be fixed for the Consolidated (Gas and Electric) Company, for the United Railways and Electric Company, and the Chesapeake and Potomac Telephone Company?
>
> "A. You are asking me *another thing.* The same rate of return; you mean to say that a Commission in fixing *rates of fare* or what not should be guided *—they must take into consideration what the traffic will bear, etc.*
>
> "Q. Of course.
>
> "A. But I would *still* say that you couldn't *enlist the capital necessary to create the railways here,* if

there were no railways here, *with an expectation of under 8 per cent*" (Italics ours).

As has been seen, the president of the Company recognized this situation, and the fact that it limits the fares the Company can charge the public. He thinks the limit is 10 cents (R. 410, 673, 1205). Whether it is that, or a token charge of 8¾ cents, is the issue in this case. More correctly stated, the issue is whether it was confiscatory for the Commission to limit the fare at the above token levels.

These fares are among the highest prevailing in any city of the United States with a population of 100,000 or over, regardless of the rate of return yielded. Most of the cities in that category have materially lower rates. Certainly other factors than those usually at work in the making of rates have been operative in the street railway industry, or such a situation would not obtain.

People's Counsel Exhibit No. 25 (R. 1517) shows that of eleven large cities in the United States comparable to Baltimore, charging cash fares ranging from 5 cents to 10 cents, only one is earning 6 per cent. That is the Chicago surface lines, charging a 7 cent, three tokens for 20 cents, fare.

The situation thus indicated is typical of the industry as a whole.

Two expert witnesses were produced by the Company to testify as to rate of return,—Mr. Nash and Mr. Downs, —both thoroughly qualified in matters of street railway operation. Under cross-examination, Mr. Nash, a Vice-President of Stone and Webster, said that of some twenty street railway properties operated by that Company, only

a handful had ever been valued, and none was earning 6 per cent (R. 842, *et seq.*) Of some ten or fifteen street railways operated by Day and Zimmerman, with whom Mr. Downs was connected, the highest rate of return actually being earned by a street railway company was 3 per cent. (R. 864). The fares charged in all the communities involved were less than those obtaining in Baltimore. A graphic cross-section of the industry was thus afforded. It was nation-wide in extent. They stated that it could not completely be paralleled in any other field of utility endeavor (R. 847). It showed the effect of service value on rate of return and fares.

Mr. Emmons, President of the Company, stated, in the course of his testimony, that he did not know of any street railway companies in the country earning 7 per cent. or 8 per cent., and knew that few were earning as much as 6 per cent. (R. 674). He called attention to the fact that the Duluth Company which was in 1925 assured a 7½ per cent. return by the courts, was only earning 1.82 per cent. on the value of its property (R. 673).

The fare fixed by the Commission in the *first order* assailed in this case is on a level with the highest token fares prevailing in any city in the country comparable to Baltimore, except Boston (R. 1511). It was materially higher than that obtaining in many cities comparable to Baltimore (R. 1511). It was calculated to yield a rate of return in excess of 6 per cent., which virtually none of the companies in other cities are earning.

The situation in Boston is anomalous. The fares are fixed, not by the Public Service Commission, which has repeatedly declared its opposition to the 10 cent fare as excessive, unreasonable and uneconomic, but by a Board of Public Trustees which operates the property. It does

not yield the Company the 6 per cent. return granted it under a service-at-cost contract, but one of 4.64 per cent. An annual deficit is paid the Company out of the tax rate (R. 1017). Similarly, the fair return assured by service-at-cost contracts in Cincinnati and Cleveland is not being earned (R. 895).

What is the duty of a commission confronted with a situation of the character above outlined? How far is it justified in going in increasing fares to meet inroads into revenue occasioned principally by the supersession of the business by another service? Must it continue to increase rates, so as to yield a fair return, as long as anyone continues to use the service, and thus compel the public to absorb the effect of the operation of economic laws in the business? Must it not only do this, but actually allow the utility a larger return than it otherwise would, as the complainant company contends, because of the degree of risk attending a declining business? Must it do this in the face of the fact that constantly increasing fares, caused by further competitive incursions, will entail still greater losses in patronage?

These are questions that suggest themselves in connection with the present case. No increase of rate or of return could, or did, stay the supersession of the horse cars by the cable car, the cable by the overhead trolley, the canals by the railroads. Had this been attempted, the trend of decline of the waning business would only have been more strongly accentuated. Economic forces are not subject to legislative or administrative control. Their operation should and must be unimpeded. It is a risk assumed by anyone embarking upon any business of any character, public or private, that progress in the art, or competitive forces, may destroy it. He can not thereupon ask the public to set him up in the competing

business, or to insure him against its inroads. The public has not undertaken to do either.

It may be noted that the same situation here under discussion has presented itself in the steam railway industry. In an article entitled "The Problem of Valuation," in the Harvard Law Review for March, 1928, Mr. James C. Bonbright, of the Columbia University School of Business, says (p. 602):

> "Despite the fact that we have been passing through a period of prosperity and of high prices unexampled in the history of this country, not only have the railways been refused the right to earn anything approaching a current rate of return on their estimated reproduction cost, but a large group of them has admitted before the Interstate Commerce Commission that, even if they were to receive official permission to earn such a return, they would be unable to do so because of the fact that the traffic would not bear rates sufficiently high to secure this object."

In an editorial in "The Railway Age" (1927; 83 Railway Age, 1147), the following appears:

> "It is highly improbable that it would even be possible to get the railways to agree to seek an advance in rates sufficient to give a so-called fair return on a reproduction cost valuation. Their managers would know that if they did so, they would encounter the united opposition of regulating commissions and shippers, and would arouse public sentiment more hostile than ever existed before. Railway officers fully realize that rates should be made not only in accordance with what the traffic will bear, but also in accordance with what public sentiment will stand."

As already shown above, the rate of return of the steam railroads of the country as calculated in 58 Inter-

State Commerce Commission Reports, 220, was as follows:

	1921	1922	1923	1924	1925	1926	1927	1928
Per cent.....	3.02	4.0	5.1	4.9	5.5	5.8	5.1	5.5

This clearly indicates that factors beyond the control of commissions or companies may limit a utility's earnings so as to deprive it of what otherwise would be a fair return. This is the general situation in the street railway industry. It should be constantly borne in mind, however, that the rates fixed by the Commission in this case are estimated to yield the Company in excess of six per cent. They are not confiscatory. They are above the level of return prevailing in the industry. They are so high as to have materially disturbed the riding habit.

The Authorities.

It is a well established rule of law that rates must in all events be reasonable to the public affected. *Chicago, Milwaukee and St. P. Rwy. Co. v. Minnesota* (1890), 134 U. S. 418; *Covington and L. Turnpike Road Co. v. Sandford* (1896), 164 U. S. 578; *Smyth v. Ames* (1898), 169 U. S. 466; *San Diego L. and T. Co. v. National City* (1899), 174 U. S. 739; *Simpson v. Shepherd* (1912), 230 U. S. 352; *Darnell v. Edwards* (1917), 244 U. S. 564; *P. S. C. v. East Providence Water Co.* (R. I. Sup. Ct.), 136 Atl. 447; *Re: San Diego Consol. Gas and Elec. Co.* (Cal.), P. U. R. 1919 D, 924; *Danbury v. Danbury and B. Gas and Co.* (Conn.), P. U. R. 1921 D, 731; *Re: Richmond L. H. E. L. Co.* (Ind.), P. U. R. 1917 B, 300; *Re: Idaho Power Co.* (Ida.), P. U. R. 1927 C, 731; *Re: Castine Water Co.* (Me.), P. U. R. 1924 B, 529; *Re: Public Franchise League,* 24 Mass. G, and E. L. C. R. 20; *Re: Capital City Water Co.* (Mo.), P. U. R. 1918 D, 561; *Re: Manchester and D. St. Ry. Co.* (N. H.), P. U. R. 1916 F, 526;

Re: Bennington Water Works Co. (N. H.), P. U. R. 1922 B, 385; *Spurr, Guiding Principles of Public Service Regulation,* Volume 3, p. 530.

This is true even though the rates fail to yield a fair return on the fair value of the property, the right to the return being subject to the limitation that the rates must be reasonable. *Re: Lewiston Gas Light Co.* (Me.), P. U. R. 1921 A, 561; *Kansas City v. Kansas City L. and P. Co.* (Mo.), P. U. R. 1918 C, 659.

In *Hamilton v. Caribou Water, Light and Power Company,* P. U. R. 1922 E, 801, at 804, the Maine Supreme Judicial Court said:

> "This Court and the Federal Supreme Court, however, have repeatedly said that the rates charged by a utility must be reasonable both to the utility and to the customer. The public is entitled to demand that no more be exacted for the service of a public utility than the services rendered are reasonably worth. Smyth v. Ames, 169 U. S. 466, 547; Kennebec Water District v. Waterville, 97 Me. 185, 202, 54 Atl. 6. The reasonableness of rates relates both to the Company and to the consumer. 'Rates must be reasonable to both, and if they cannot be to both, they must be to the customers.' Brunswick and T. Water District v. Maine Water Co., 99 Me. 371, 380, 59 Atl. 537, 540. It would be quite as objectionable to take from the consumer more than the service was reasonably worth, as it would be to deprive the Company of a fair return upon a fair value of its property. *If the rates established represent the maximum reasonable value of the service to the consumer, it cannot be said that they are confiscatory as to the company, whatever may be the result upon its return*" (Italics ours).

This is a direct contradiction of the Company's contention that value of service can not limit rates below

the level of confiscation. It will be seen later that this Court has never recognized such a limitation on the doctrine.

The principle that rates must in no event exceed the value of the service, regardless of return or confiscation, is as old and as firmly established as the rule that a utility is entitled, when that principle is inapplicable, to a fair return on the fair value of its property. It has been expresed by this Court as follows:

Chicago, Milwaukee and St. P. R. Co. v. Minnesota (1890), 134 U. S. 418.

"The question of *reasonableness* of a rate or charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and *as regards the public,* is eminently a subject for judicial investigation, requiring due process of law for its determination" (Italics ours).

Covington and L. Turnpike Road Co. v. Sandford (1896), 164 U. S. 578.

"It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. *If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation operating the road should be entitled to maintain rates that would be unjust to those who must or do use its property.* The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * If a corporation cannot *maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the*

Constitution does not require to be remedied by imposing unjust burdens upon the public" (Italics ours).

The rule thus laid down is the direct negation of the Company's claim that rate of return should be increased to offset declining business. It by no means appeared that this Court or the Turnpike Company considered the industry involved to be moribund. The Company's complaint was that it was unable to earn 14 per cent. on its stock, which the legislature had assured it. The effort of the Judge of the Circuit Court No. 2 of Baltimore City to limit the application of the principle of service value to developing or moribund industries is accordingly seen to be without foundation (R. 74).

Smyth v. Ames (1898), 169 U. S. 446.

"It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted, without reference to the fair value of the property used for the public *or the fair value of the services rendered*, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

"If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits on such excessive valuation or fictitious capitalization. * * *

"* * * What the public is entitled to demand is that no more be exacted from it for the use of a pub-

lic highway than the services rendered * * * are reasonably worth." (Italics ours).

San Diego Land and Town Co. v. City of National City (1899), 174 U. S. 739.

"This court had previously held in Road Co. vs. Sandford, 164 U. S. 578, 596, 598, 17 Sup. Ct. 198, which case involved the reasonableness of rates established by legislative enactment for a turnpike company, that a corporation performing public service was not entitled, as of right, and without reference to the interest of the public, to realize a given per cent. upon its capital stock; that stockholders were not the only persons whose rights or interests were to be considered; and that the rights of the public were not to be ignored. The Court in that case further said: *'Each case must depend upon its special facts;* and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway, are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests *both of the public and of the owner of the property,* together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. * * * *The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receives what, under all the circumstances, is such compensation for the use of its property as will be just,* both to it and to the public.'

"These principles are recognized in recent decisions of the Supreme Court of California. San Diego Water Co. v. City of San Diego (1897), 118

Cal. 556, 50 Pac. 633; Redlands L. and C. Domestic Water Co. v. City of Redlands (1898), 53 Pac. 843, 844.

"The contention of the appellant in the present case is that in ascertaining what are just rates the court should take into consideration the cost of its plant; the cost per annum of operating the plant, including interest paid on money borrowed, and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair profit to the company over and above such charges for its services in supplying the water to consumers. Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as, under all the circumstances, will be just to the company and to the public. *The basis of calculation suggested by the appellant is, however, defective in not requiring the real value of the property and the fair value in themselves of the services rendered to be taken into consideration.*" (Italics ours.)

Simpson v. Shepard (1912), 230 U. S. 352.

"The property of the railroad corporation has been devoted to a public use. There is always the obligation springing from the nature of the business in which it is engaged—which private exigency may not be permitted to ignore—that there shall not be an exorbitant charge for the service rendered."

See also—

Opinion of Mr. Justice BRANDEIS, in *S. W. Tel. Co. v. P. S. C.* (1923), 262 U. S. 276, 290.

No limitation of the rule to moribund or developing business was contained in any of these cases.

The Peculiar Applicability of This Rule to the Street Railway Industry Under Present Conditions Is Well Recognized.

The applicability of the limitation imposed by service value has been fully recognized in the street railway industry. Competition has resulted in increased rates, which have entailed further passenger losses. Rates have had to be limited to what the traffic would bear.

The California Commission said, in *Re Pacific Electric Railroad Company*, P. U. R. 1922 C, 134 (page 144):

> "If 8 per cent. were at the present time held to be a fair rate of return, then a reasonable net earning after operating expenses, depreciation and taxes would come to approximately $5,150,000 (exactly $5,153,716). *We do not hesitate to say at this point that if rates were fixed to produce such a return, regardless of all other circumstances, such rates would, in our opinion, be unreasonable rates and would not be just and fair to the public.* It is well understood that with local street railway and electric interurban rates, there exists what may be termed an *economic maximum* in the rate, which practically cannot be exceeded *regardless of theoretical rate base and fair return calculations.* It happens that in the case of electric railways, and especially in the case of this particular railway, this economic maximum is determined to a large extent, by *competitive forces, and we have reference now to the competition of the private and public service automobile and truck.*" (Italics ours.)

Re Fishkill Electric Railway Company (N. Y. P. S. C. 2nd Dist.), P. U. R. 1919 D, 1, at 7:

> "The supply of trolley service and the demand for such service are often not in proper adjustment. The builders of the trolley systems built according to their varying judgments. Naturally the usual

average of mistakes was maintained in these as in all human enterprises that must necessarily deal with futures such as city, suburban and interurban growth, direction of such growth, *competitive methods of transportation*, life of machinery and materials, rate of electrical machinery equipment, with consequent obsolescence, labor costs, and numerous other variable factors. *The legal entitlement to a reasonable return on the value of the property used in the public service is only a right to earn same, not a guaranty.* If errors of judgment were made with regard to the factors above mentioned it might well develop that the value or cost of a utility system might be greater than the public demand required. This requirement is the natural result of an economic law in operation, and of course cannot be altered by order of this Commission. * * * A requested increase may apparently be justified because of a lack of reasonable return; and yet the increase asked might, if granted, actually result in a decreased, instead of an increased, revenue. *Where a deficiency in revenue must be met, the real problem is to find and fix the rates that will permit the most people to ride and still be high enough to cover costs. These rates may well be called the economic rates.* Lesser rates spell bankruptcy; higher rates mean reduced operating revenue and a similar result. When these rates are finally found, they measure the economic demand for trolley service in that community. If the service is more extensive or more expensive than such demand requires, then the system to become and remain solvent must scale sufficient assets or abandon enough of its tracks, or both, to reduce the outgo. The income has reached its limit at that point."

It will be noted that the Commission did not increase the rate of return because the business was declining.

In *Re Alton G. and St. L. Traction Co.*, No. 8226-A, May 7, 1919, the Illinois Commission said (P. U. R. 1919 F, 136):

"The Commission has had occasion in numerous other causes to observe the results of increased fares for street railway service, and has found in these cases from traffic studies made subsequent to the increase of fares, that the actual gross revenue realized in most cases is not in proportion to the increased rates of fare authorized. This condition appears to have existed in Alton to a limited degree, and would probably be more emphasized if the further increase were authorized. *In other words, the increases of fare have a marked effect upon the traffic, tending to materially decrease it.* Obviously increases which bring about such results do not satisfactorily meet the situation from the utility's standpoint, and result only in inconvenience and dissatisfaction to the patrons. *From a practical standpoint, this must receive serious consideration in a determination of the applicability of the proposed increased fares.*"

In *Re Helena Light and Railway Company* (Mont. P. S. C.), P. U. R. 1925 E, p. 1, at p. 3, the Montana Commission said:

"The fortunes of the street railway ebb and ebb. Most tides turn, but this one appears to recede steadily. *Motor vehicle competition, both regulated and unregulated, is primarily responsible for the reliction in revenues.*"

In *Re Ithaca Traction Corporation* (N. Y. P. S. C. 2nd Dist.), P. U. R. 1919 B, 616, the opinion contains the following:

"There is a limit beyond which trolley fares should not go; in fact that cannot be advanced beyond a certain point without disastrous results to the Company. * * * The people should not be required to pay an excessive fare. If they are required to pay such fare the result will be detrimental to the corporation itself"

In the 6 cent Fare Case involving the complainant Company, the Maryland Commission recognized the effect of service value on street railway rates:

> "The authorities of highest repute are practically unanimous to the effect that *the public should not be required to pay for a public service more than such service is fairly and reasonably worth, and the cost of rendering that service is merely one of the evidences of the fair worth of the same.* * * * This Commission is fully mindful of the desirability of upholding the credit of all public utilities subject to its jurisdiction to the fullest extent consistent with justice to the general public. *But it is also fully mindful of the ultimate dangers of a false credit bolstered up by orders establishing rates for services which are not justified by the fair worth of the service rendered.*"
>
> 10 Md. P. S. C. Rep. 39, 58.

The Limitation of Service Value Applies With Peculiar Force Where a Business is as Yet Undeveloped, or When it is in Process of Decline.

There are two typical classes of cases in which the value of the service to the public exercises its most marked limitation on the right of a utility to earn a fair return on its valuation. The first is the case of a utility that has entered an undeveloped or underdeveloped territory, and is seeking to survive the developmental period. The second is that of a utility in a developed field, faced with loss of a considerable part of its existing patronage through competition or other causes.

In the first class of cases, no doubt has even been entertained but that the rates of the utility, such as a railroad, entering undeveloped territory, frequently can not be made compensatory during the period of growth, in fairness to the public.

Re Illinois Northern Utilities Commission (Ill.), P. U. R. 1920 D, 979:

> "Gas plants, located in small communities, cannot expect rates sufficient to make them paying concerns, because such rates would exceed the value of the service to the consumer."

Fett v. Firth (Cal.), P. U. R. 1922 B, 505:

> "The investment in a water utility serving a tract that is only partially settled and in its development stage, cannot be used as a basis for establishing rates, but consideration must be given to the value of the service and the ability of the consumers to pay."

In the second class of cases, and the case with which we are here concerned falls in the second class, the rule is as definitely formulated.

Re *Leadville Water Company* (Colo.), P. U. R. 1921 D, 172:

> "The Commission is of the opinion that no rate can be fair and reasonable unless it is fair and reasonable to the consumer. For example, suppose this plant actually cost $1,000,000 and a valuation by the Commission's engineer would support this cost as an actual valuation upon which this Company is entitled to a return; suppose that the actual population has decreased from 16,000 to 5,000; that the actual users of water have decreased in number to only about 50 per cent. of what they were three years ago, and that the rate necessary to be charged to earn a fair return upon this sum as a fair value would be excessively high and practically prohibitive; should the present consumers be penalized with rates to maintain a plant far in excess of its present needs? How far should this principle of a fair return on the investment be carried? Suppose the City of Leadville's population should decrease to 500 people; should the remaining 500 be compelled to

pay rates to maintain this plant as originally built and pay a return on the original investment? *This must be answered by the statement that if the Company finds it is unable to render service at fair and reasonable rates, it must accept the burden itself, and cannot be permitted to pass its own misfortunes on to the consumers by placing on them an undue burden"* (Italics ours).

The formula suggested by the Company would have supplied a quite different solution. The Company's rate of return would be made higher than that earned by successful companies because of the risk inherent in the business.

R. J. Darnell v. Edwards, et al., constituting the Mississippi Railroad Commission (1917), 244 U. S. 564, page 569):

"It is insisted that upon the proofs, and especially by actual experiment, the rates established by the Commission were shown to be confiscatory. * * *

"It is well established that in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing. * * * Practically the entire business of the road, at first, was hauling logs from complainant's land to a mill operated by R. J. Darnell, Incorporated, at Memphis. *That mill was destroyed by fire in June,* 1913, *and thereafter the corporation constructed a mill at Batesville, but this was not placed in operation until March* 17, 1914. *In consequence there was a heavy falling off in traffic on the road, there being no Darnell shipments except such logs as were on hand when the Memphis mill was burned.* * * *

"The circumstances that a road may have been unwisely built, in a locality where there is not sufficient business to maintain it, may be taken into account. * * * *And the nature and value of the service rendered by Company to the public are matters to be*

considered. Covington and L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 597, 41 L. Ed. 560, 566, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 544, 42 L. Ed. 819, 848, 18 Sup. Ct. Rep. 418."

"* * * It is sufficient for the present to say that the experimental period was too brief;—and conditions during the entire period covered by the testimony have been too abnormal to enable us to say that the Commission's rates are confiscatory." (Italics ours).

The Company in the above case contended that it was not earning any return at all. This situation was largely attributable to loss of business through the destruction of a mill. The situation in the latter respect resembles that of the complainant Company.

Did this Court hold that the logging railroad was entitled to eight per cent. plus, because of the risk attending its business? That a utility which could not survive the test of competitive conditions and private business should be held harmless by the State against loss?

The application of the formula asserted by the Company was not even suggested by, or apparently to, this Court. That the process of decline should be accelerated by increasing the rate of return of a waning business has never before, it is believed, been seriously argued. It has not the merit either of practicability or logical appeal, though it has those of novelty and ingenuousness. Its adoption would be disastrous.

The application of the limitation on rates imposed by service value has never been limited to cases within the two classes above discussed. They are illustrative because its operation is, as to them, accentuated. Courts and commissions have given abundant recognition to the

fact that the street railway industry is a waning industry. But that is a result, not a cause. The cause is automobile competition, which necessitates increased rates. And that there is a limit to be placed on rate increases, in the public interest, is conceded.

Valuation, rate of return, and value of service are facts to be considered in every case, and accorded such weight as they merit. Where rates are inherently low, as compared to rates for similar service prevalent elsewhere, or the cost of living, value of the service will not be accorded weight. Where the contrary is true, it will be accorded weight, and that weight may be controlling. But in all cases, the consideration and weighing of these factors is not a matter of mathematical formula, but of common sense, calling for the exercise of sound discretion on the part of the commission. And rates have been limited in some cases by service value in every branch of utility endeavor.

The Present Value of a Street Car Ride is Not in Excess of a Token Charge of Eight and Three-Quarter Cents.

In a recent decision, the New York Public Service Commission said:

> "The fare requested by petitioner in the cities is a 10 cent cash fare with three tickets for 25 cents. * * * These fares *will not yield a revenue sufficient to allow what is regarded as a fair average rate of return upon the value of the property used in the public service, but they may be as high as the traffic will stand.* The exhibits presented show a marked decline in number of passengers carried since the year 1917. *This is undoubtedly due to the large use of privately owned automobiles.*" *Re Fonda, J., etc., R. Co.* (1927), P. U. R. 1927 B, 762 (Italics ours).

In *City of Albany v. United Traction Co.*, P. U. R. 1927 D, 637, at 660, the New York Commission said:

> "Annual reports of this Commission for each of the past several years have directed attention to the fact that net revenues of electric street railroads throughout the State have almost uniformly steadily decreased, in some cases being insufficient to pay operating expenses and fixed charges.
>
> "Our study of the situation indicates that while in some instances it may have been caused by inadequate rates, either fixed by a regulatory body or by franchise requirements, yet primarily the cause is a diminution in traffic due to the ever increasing demand of the public for motor transportation. The difficulties these utilities find themselves in have not been caused so much by the present high level of labor and material costs, but result from the general availability of low cost transportation operated by the individual, as well as a partial failure on the part of the electric railroad industry to understand and devise means of meeting the situation."

The Commission allowed a rate of 10 cents, with 13 tokens for $1, estimating that it would yield 6.11 per cent.

In *Re Western New York and Pennsylvania Traction Co.* (N. Y. P. S. C., 2nd Dist.), P. U. R. 1920 A, 951, the Company sought a 10 cent urban rate. The Commission fixed an eight cent rate instead, *although the Company was not earning a fair return,* because "it is believed that this will work better results than the higher rate demanded so far as the corporation is concerned, and it certainly will work *less hardship to city passengers.*"

The attitude of the commissions and courts toward the straight ten cent fare is well illustrated by two Massachusetts cases:

Donham v. Public Service Commission (Mass. Sup. Ct., 1919), 232 Mass. 309, 122 N. E. 397, P. U. R. 1919 C, 880.

"As already stated, the schedule now proposed by the receiver is in substance to eliminate all tickets, including workmen's tickets, to establish city zones with a uniform 10 cent fare, and to divide the country lines into zones about two miles in length with a minimum fare of ten cents for 2 zones and 5 cents for each succeeding zone. With reference to this it is said in the report (the report of the Commission) that in no other communities of similar size in the United States is a minimum fare of 10 cents charged or even proposed, and that nowhere else in the country is so radical and *burdensome* an increase in fares made or proposed as compared with that of October 1, 1916, on the Bay State System. It is said, also: 'In the first Bay State Rate Case the Commission held that, to sustain the burden of proof imposed by the statute, the company must satisfy the Commission that there is at least a reasonable prospect that the change in fares desired will result in an increase in revenue. In the present instance the receiver and the management apparently believe that the new tariff will produce substantially the gain in revenues estimated. On the other hand, the remonstrants, many of them official representatives of the cities and towns involved, were unanimous in expressing the conviction that a 10 cent minimum fare will be disastrous in its effect upon the Company itself, and it is our belief that they were entirely sincere in this expression. *It is also within our knowledge that many street railway officials are skeptical as to the wisdom of so high a minimum rate. Street railway fares have been more frequently and more generally raised in Massachusetts than in any other part of the country; and while it cannot be said that no advantage to the companies has resulted, it is true that in nearly every case the gain in revenue has been less and often far less than the prior estimates.* Other factors have entered in, but making all due allowances, *it is quite clear that*

increases in fares impose a burden upon the public which considerably exceeds the benefit which they bring to the companies.

"• • • 'The cities served by the Bay State are compact, the distances are short, and the population is made up on the whole of persons of very moderate means. It is possible that there are sufficient patrons who cannot find other means of transportation, who cannot walk or move their place of residence, and who are obliged to use the Bay State cars, so that revenue advantage may be gained from the proposed new fares. Our experience in many other cases, however, leads us to place little faith in the estimates of gain submitted, and to share the fears expressed by the representatives of the communities. The best that can be said of the new schedule, from the point of view of the company, is that it is a chance. Viewing the new rates from the public point of view, there is a certainty of a most disturbing effect. It is impossible to raise fares within a period of two years to the extent proposed in the company's new tariff, without disrupting and dislocating the conditions to which community life has become adjusted. The new schedule means that the Company will practically abandon the short haul business in the city centers, and from the centers to the nearby suburban towns the rates will be so increased that it is difficult to believe that much regular daily traffic can in the long run be preserved. Still more disturbing, however, is the fact that even if the new fares should prove unsuccessful in producing the revenue desired, experience has shown that it would be well-nigh impossible thereafter to reduce them'."

The Commission refused to permit the Company to put the proposed fares into effect, but substituted a schedule of its own providing for a fare on city lines of 7 cents, to be made available to the public only through the purchase of tickets or tokens at the rate of 5 for 35 cents, with the proviso that the cash fare should be 10 cents.

The Court found that this action of the Commission was not unlawful or unreasonable, although the Company was not earning a fair return on its property, but a return that would have been confiscatory but for the question of the inherent fairness of the rates to the public.

Re *Middlesex and Boston Street Railway Company* (Mass. P. S. C.), P. U. R. 1919 F, 40 (page 41).

"Whatever view may be entertained in regard to the effect of past increases, the effect of a further increase to 10 cents, a sharper increase than any heretofore made, *must be largely speculative.*

"From its study of the results of various forms of fare increases established by other companies, the Commission is inclined to believe that a readjustment of fare zones, with a lower rather than a higher rate of fare, is likely to yield a larger increase of revenue for the Company, *and to be preferable also from the standpoint of the public.*"

This is the attitude of the courts and commissions of the State in which the greater number of 10 cent basic fare cities are located.

In *Wood v. Elmira Light, Water and Railway Company* (New York P. S. C.), P. U. R. 1927 B, 400, 464, the New York Commission refused to approve a 9 or 10 cent flat fare, which would be required to yield the company an 8 per cent. return, on the ground that the rates could not be collected by the Company if authorized. They were more than the traffic would bear. They were beyond the economic limit.

The Company contends that ten cents is not in excess of the value of a car ride under present-day conditions, because operating expenses per car mile have greatly

increased since 1913, when the 5 cent far was in force, and because the wages of union labor have more than doubled since that date (Company Exhibit No. 29; R. 1460).

Obviously, in a study of the value of service to the public, its cost to the Company is not entitled to controlling importance, or indeed to much importance of any character (R. 140). Cost of service and value of service are two different things. Each is of significance in its proper setting. They should not be confused.

Even if one indulged in the violent assumption that wages of union labor represented the purchasing power of the Baltimore public, wage increases do not furnish a satisfactory test of street car service value. A ride is not worth all that some portion of the community whose income has greatly increased is able to pay for it. Its worth might, however, be measured with reference to its present position as compared with the general change in price levels for other commodities, and the cost of living. Based on this comparative standard, what is the worth of a car ride today? The cost of living is 173 per cent. of what is was in 1913 (testimony of Doctor Hollander (Company witness) R. 1176; Company's Exhibit No. 29, R. 1460). This would justify a fare of 173 per cent. of 5 cents, between eight and nine cents; i. e., that fixed by the Commission. Certainly, it would not justify a ten cent fare. In other words, the Company's testimony and exhibit support the Commission's finding and not the Company's contention.

The test above adopted places the car fare on a level with the United States Bureau of Labor curve representing the cost of living in Baltimore. It is an attempt to evaluate service in terms of 1913 costs. Some such ob-

jective standard must be applied, rather than mounting Company costs or public paying capacity. Not all goods or services are worth what they cost to produce.

It is not conceded that car fares should be increased proportionately with the increase in the price levels of other commodities. The competitive feature of the street car business, above referred to, might limit the fare at a lesser figure than increase in the price of other commodities would otherwise warrant. Certainly, however, the test is a fairer one than those arbitrarily adopted by the Company.

Value of service is entitled to controlling weight in the fixing of the fare of the respondent Company, in that any charge over and above the rates fixed by the Commission would exceed its worth to the public. The Courts have not required that the State subsidize a declining industry, but they have laid down the rule that the interests of the public should be protected. In this case, the Commission has protected both utility and public. It has granted reasonable rates that yield a fair rate of return. Its action should not be disturbed.

Intrinsic Value and Economic Value.

Before the Commission the Company did not deny the soundness of the rule laid down by the above authorities to the effect that rates must not exceed the value of the service to the public ragardless of the return to the utility. Its argument was, first, that a ten cent flat fare proposed by it was in itself reasonable to its customers, and secondly, that such fare was not so high as to cause such a falling off in passengers that the increase in fare would yield no net increase to the Company, that is, that a ten cent fare would not exceed the economic limit.

The economic limit, however, does not measure value to the public. A fare may be made so high as to be profitable regardless of drastic curtailment of riding. The true test is the effect of a given rate on the riding habit. That is the instinctive reaction of the public to the rate.

Intrinsic value and economic value, as above used, represent two distinct ideas. A rate of fare too high, either intrinsically or economically, would be indefensible,—though for different reasons. Our contention is that a ten cent flat fare as proposed by the Company would be beyond the intrinsic and economic value of a car ride.

The Company argued before the Commission that "flat ten cent fares are in themselves reasonable to its customers—not more than the service is worth"; that is, that such fares are intrinsically worth ten cents flat. What then is intrinsic value? And if there is such a thing as the intrinsic value of a car ride, how can it be ascertained? Our view is that the principal element which establishes the value of a car ride is to be found in the demand, *when such demand is permitted to operate free from artificial conditions.*

Our opponents, however, have undertaken to split up the idea of intrinsic value into certain component factors, and taking these separately, to show that each factor leads to the conclusion that a car ride is now worth not less than ten cents flat to the customer, i. e., that the intrinsic value of a ride is not less than ten cents. We submit that even from this method of approach, which we think is fundamentally unsound, the results obtained are inconclusive. It is true that the capacity to pay of the ordinary car rider has increased in recent years. But how can the value of a service or a commodity be fairly measured by the capacity of a purchaser to pay?

This is the language of taxation, and not of commerce. If capacity to pay is the standard of value, then, of course, the wealthy would pay one rate and the poor another. It is submitted that one of the central ideas behind the establishment of public service commissions was to prevent the exaction by public utilities of fares measured by the capacity of the public to pay.

Should the value of a car ride to the consumer be measured by the *cost to the company* of furnishing the ride? It is, of course, true from one point of view that cost is an element of value. But in some cases it may have no importance at all. Kerosene oil for lighting purposes, for example, may be of better quality and may cost more to produce than it did twenty years ago; but to a man whose house is lighted by electricity, its value has not been increased by this additional cost but, as to him, has actually been diminished by the introduction of a new factor—electricity. Again, cotton stockings may cost more to produce than they did in pre-war days, but they have not more but less value in the eyes of the purchasing public, who want not cotton stockings but silk ones. Would a manufacturer of cotton stockings expect to keep on manufacturing at a greater cost and to demand for them a greater price because of their greater cost, or would he go into the silk stocking business? In short, costs without relation to demand furnish no criterion of value.

In some respects it is true that a car rider now would get more for a ten cent fare than the pre-war five cent fare gave him. But does this fact increase the worth of a car ride to the customer to ten cents? It does not, unless the assumption on which the argument is founded is true, i. e., that the five cent fare was itself a reasonable fare.

Considering the long history of the street railway companies, their experimental stages, their wasteful construction, the losses they were able to absorb and still make money, it may well be doubted whether a five cent fare did not represent in its day a high fare rather than a low one.

Furthermore, in many respects, the car rider of today gets less for his money than he got a generation or more ago. Then, he got "rapid transit"; today the tracks are congested with automobiles and travel is slowed up. The "skip-stop" is a novel idea—not a popular one. Formerly it was possible, in off-peak hours, to get a street car without a long wait; today, time as well as money is saved by walking, instead of riding, short distances.

But, says the Company, the service it furnishes is *worth having;* and service worth having is worth what it costs, plus a fair return on capital. The evidence that the service is worth having (so the argument runs) is found in the fact that people do use the cars, though in steadily decreasing numbers, and that, in spite of the fact that more people every year are using automobiles instead, the street car service still remains a necessity. For such a necessity, they argue, the public must pay,—its cost plus a profit. Is the transportation service of the Company an economic necessity in the sense that its (now) fewer patrons must be compelled to pay the costs (including a profit) of operating a plant built to meet the needs of the public at a time when street cars were the *exclusive* means of transportation for *all* the people? In the true sense, a necessity is something which must be had—something for which the demand is so strong that if the agency furnishing the demand were destroyed, it

would be immediately replaced. Now it is true, that *transportation* in Baltimore is a strict necessity in this sense. It is none the less true, that the particular form of transportation furnished by the Company is not such a necessity. The Company is the result of a consolidation of many other companies, a large number of which were competitive. Its lines are built without reference to present public needs, but they have been valued at 1924 reproduction new figures. There are cities, comparable to Baltimore, which do not have surface electric cars at all,—London, for example. And if through some catastrophe, the Company's plant in Baltimore were destroyed, who would now argue that it would be duplicated? The demand for transportation would remain just as great as it now is, but there would be no demand, i. e., no necessity, for reproducing the particular form of transportation now furnished by the Company. The fallacy in the argument of our opponents lies in their claim that it is the *service* of the *Company* which is a necessity, whereas the real and only necessity, is the necessity for transportation. And the public demand is for transportation by automobile and not by street car. The evidence of the truth of this statement is plain for every one to see. No new electric street railways are being built. The industry, once prosperous and expanding, is now in financial straits and is declining. This condition, the subject of general comment in the street railway world, is not local, but universal. It is idle to seek to make a scape-goat out of the public service commissions of the entire country for this condition. Other public utilities, likewise subject to commission regulation, are at this moment enjoying the greatest expansion and prosperity in history. The population of Baltimore is increasing, there is a greater and greater demand for transportation,—but not for transportation by electric

street cars. Bus operation has been substituted for street cars in Maryland cities while this case was pending.

Now the Company has a complete monopoly on transportation within its own field. No other electric street railway company could invade this city as a competitor. No other company, of course, would desire to do so. If, however, the Company did not have a monopoly and if the field of public transportation for hire were open and free, unquestionably the public demand for transportation by automobile would be promptly met. The essence of the Company's case, therefore, is nothing more than a demand to be protected in its monopoly. It has built up an extensive property adapted to conditions which have completely changed. If it were a private enterprise, not protected against competition in the same line of business, it could have made no effort to force the public to take its product. Natural economic forces would soon have compelled it to transform its business or go out of business.

What seems to be a public demand for the Company's service, turns out to be only the effect of its monopoly. The public must have transportation, the Company's monopoly compels them to take what it has to sell. They cannot set up a competing bus service. The claimed necessity of the street car service, therefore, is an artificial necessity and not the natural result of the operation of economic laws. The *cost* of the service to a Company so situated is no standard by which to measure the *value* of that service to the public.

Our opponents further argue that a ten cent flat fare would not be beyond the limit of economic productivity, —in words more homely, but not less expressive, would

not be more than the traffic would bear. That there is such a limit cannot, of course, be denied. No assumed necessities of the Company as to rate of return on property, increased costs or what not, could justify a charge of say, twenty-five cents for a car ride. The Company itself recognized that 2 per cent. of its passengers would cease riding in 1928, if it was allowed to put into effect a ten cent fare. This would mean, roughly, a loss of more than 4,000,000 revenue passengers. They would hardly stop riding from choice, but rather from necessity,—a necessity forced on them by the Company. It was claimed that the loss of revenue passengers would not exceed this 2 per cent. and that the increased fare would result in an increased return to the Company. In support of this contention the Company argued that in the past increases in the Company's fares had not been followed by decreases in revenue passengers or passenger revenue and that, therefore, an increase from a fare of eight cents, with two tokens for fifteen cents, to ten cents flat would not have that effect. Now in 1927 the decline in passengers was more than 3 per cent. over 1926 and, there being no change in the rate of fare in 1927, the Company attributed the loss wholly to the competition of the private automobile. It predicted a loss for 1928 of 5 per cent. and attributed 3 per cent. of this loss to the automobile and 2 per cent. to the increase in fare. This distribution of the percentage of loss between these two factors, as well as the total percentage, was at best but a guess. No consideration was given by the Company to the fact that the increase proposed by it, was an increase added to an already increased fare, that is, an increase from eight cents flat, two tokens for fifteen cents, to a flat ten cent fare. It is the last straw that breaks the camel's back. When it is remembered that the competition of the automobile is increasing, and that the public

prefer that method of transportation, and would have it if they could get it, it is submitted that such an increase as the Company contends for would prove more than the traffic would bear. Loss of passengers and drastic decline in revenue under the fares fixed by the Commission have demonstrated that fact.

Value of service must be measured by an objective standard,—not by the standard of cost to the Company, which may be higher or lower than the value of the service, or by that of the paying power of the public, which is more appropriate as a tax measure.

There is no mathematical formula for rate-making, or for any factor involved in it. The factors principally involved are valuation, rate of return, and value of service. As to none of them is there a mathematical equation that will yield the correct result.

Courts and Commissions in decided cases, reported in Public Utilities Reports, Annotated, however, have recognized that there are certain objective standards from which service value can be determined. One is, rates for similar service generally prevalent elsewhere. Another is, the decisions of courts and commissions determining the value of such service. A third is, the effect of the fare, not on revenue, but on riding, which indicates the instinctive reaction of the public to the rate. A fourth is, the relation of the fare to the cost of living and the prices of other commodities.

The highest generally prevalent level of street railway fare is a token charge of 8⅓ cents (R. 1511). It has been seen that commissions have found that charge to be the limit of present service value, and that courts and commissions have found the ten cent fare to be above it.

It has been seen that the increase in cost of living since 1913 would justify a fare equal to, and not one in excess of, that fixed by the Commission, and that this fact was established by Company testimony and exhibits.

The effect of the fare on riding is as nearly a perfect index as can be found of its fairness to the public. If large numbers of persons curtail riding, and others cease to ride at all, because of an increase in fare, strong evidence is thereby afforded that the worth of service has been reached or exceeded.

In this rspect, it should be noted that while the president of the Company states emphatically that in the past, fare increases have not resulted in decreased riding, he concedes than a ten cent fare will result, in and of itself, and independently of the effect of automobile competition, in a loss of at least two per cent. of passengers carried. This means a minimum loss of 4,000,000 rides a year. No more graphic evidence could be afforded that the value of the service to the riding public would be exceeded by the proposed fare, unless it be the actual and far heavier passenger losses under the fares fixed by the Commission.

The Circuit Court No. 2 of Baltimore City disregarded the test of determining present street railway service value with reference to increase in the cost of living, on the ground of increases in wages, to a still greater extent, since 1913. But this confuses two standards, and introduces the irrelevant issue of the paying power of the public. Were this the determining issue, there would be no need for, nor efficacy in, regulation. It was primarily because the public had not equal bargaining position with the utility that regulatory bodies were created. The test afforded by comparison of changes in the cost

of living, *based on an exhibit introduced by the Company,* (R. 1460), affords an objective indication of the worth of street car service. Obviously, the whole cost of living figure, and every component figure in it, could be increased by resort to the increased earnings basis. But the prices of other commodities, sold under competitive conditions, have not been increased to meet the increased wage level of labor. Why should the car fare, merely because the industry involved is subject to regulation, be increased because the wages of some laborers have exceeded its persistent rise?

V.

The Action of the Commission in Abolishing the Second Fare on the Company's Halethorpe Line Was Based on Substantial Evidence and Was Lawful. In a Case Where, as Here, the Question is as to the Reasonableness of an Entire Schedule of Rates Particular Rates on Particular Lines Are Immaterial if the Schedule as a Whole is Reasonable.

The question is not whether the former establishment of the City Line as the limit of single fare zones, by the Commission, was reasonable; but whether the Commission could, in the exercise of reasonable discretion, or must, under the law, order the extension of the single fare zone to a point beyond the City Line, but located closer to the center of the City than other points enjoying the one-fare privilege.

Actually, the City Line standard was never entirely observed. Exceptions were made, with the acquiescence of the Company, and to meet the varying demands of particular situations.

Art. 23, Sec. 365 of Vol. I of Bagby's Annotated Code of Maryland forbids any common carrier to "give any undue or unreasonable preference or advantage * * * to any locality * * * or subject any * * * locality * * * to any prejudice or disadvantage in any respect whatsoever."

The situation of Halethorpe is as follows:

The Company has twelve lines extending to and into the suburbs of Baltimore. The Halethorpe line is the shortest of them all. The first fare zone of three of the lines is just slightly shorter than the total two fare zone of the Halethorpe line and materially larger than its first fare zone. The first fare zone of the other eight lines is longer than the whole Halethorpe line. The first fare zone of five of the latter eight lines extends a substantial distance beyod the City Line. Four of the said eight lines have no second zone whatever, and three of these extend beyond the City limits.

The Court of Appeals said (R., pp. 1652-1653):

"The Commission found as a matter of fact that 'the total distance from the center of the City that may be travelled on the Halethorpe line is a fraction more than five miles, while the single fare zones on nine other lines extending into the suburbs are longer than the two zones to Halethorpe. As pointed out by counsel, the first fare zones of six of these nine lines extend a substantial distance beyond the Baltimore City limits. Five of them have no second fare zones whatever'. That finding was based upon undisputed evidence, and in our judgment afforded a substantial basis for the action of the Commission in including the entire Halethorpe line within a single fare zone, and we cannot say that it was either unlawful or unreasonable, and we will not

therefore disturb that part of its order which deals with that question. N. C. Ry. v. P. S. Com. 122 Md. 355."

In *Portland Railway, Light and Power Company* vs. *Railroad Commission of Oregon* (1913), 229 U. S. 397, this Court upheld the action of the Oregon Commission in removing a discrimination against a suburb of Portland on a two-fare zone line, where similarly circumstanced suburbs farther from the center of the City enjoyed a one-fare privilege.

In *Puget Sound Traction, Light and Power Co.* v. *Reynolds* (1917), 244 U. S. 574, 580, 581, this Court said:

> "But we cannot accede to the suggestion that the question whether the Commission's order is confiscatory or otherwise arbitrary within the inhibition of the 14th Amendment is to be determined with reference alone to the Alki, the Fauntleroy or the Ballard Beach lines. These are and long have been operated by plaintiff as parts of a system comprising 200 miles of tracks. * * * It was not and is not contended that the system earnings are unremunerative.
>
> "'* * * the Company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative.'"

While there is some reference in the Record to the fact that the operation of the Halethorpe portion of Line No. 3 is unprofitable, there is no suggestion made that even the entire line does not pay its way, and it has been shown elsewhere that the return on the system as a whole is not unreasonable. A street railway or other utility can not expect a full or even a fair return on every isolated unit

of its property. It is sufficient if its return on the property as a whole be fair. See *Spurr, Guiding Principles of Public Service Regulation*, Vol. 3, p. 207, *et seq.*

It may be, and probably is, true, that refusal of the Commission to remove the discrimination existing against Halethorpe, would have been 'unlawful and unreasonable.'' Certainly, it was not unlawful for it to end a preference discriminatory in fact and apparently also in law.

VI.

The Maryland Statutes, as Construed and Applied by the Court of Appeals, Did Not Deprive the Company of a Judicial Review of the Question of Confiscation.

By its sixth assignment of error the Company raises the question as to whether the Maryland statutes deprive the Company of a judicial review of the action of the Commission. *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287. This involves two questions, (1) the provisions of the statutes, and (2) the construction put upon the statutes by the Court of Appeals.

(1) The provisons for court review of commission rders are contained in Bagby's Annotated Code of Maryland, Vol. 1, Art. 23, Secs. 404 to 410, incl. They are copied in the Appendix to this Brief, pages 157-160. Briefly summarized they provide as follows:

Any corporation or person in interest may commence an action in any court of Baltimore City of appropriate jurisdiction against the Commission to vacate and set aside any order on the ground that it is unlawful or unreasonable. The Commission is required to answer, whereupon the action shall be at issue. Recourse to the

courts must be taken within sixty days after rendition of any order complained of, and this right shall determine absolutely at the end of such sixty days after the entry of such order. No injunction shall issue suspending or staying any order except upon application to one of the judges of the Supreme Bench of Baltimore City, or to the Circuit Court of one of the counties, and upon notice to the Commission and after hearing (Sec. 404). Provision is made for the introduction of new evidence before the court by the *plaintiff* and if this is found to be different from that offered upon the hearing before the Commission or additional thereto, the court, unless the parties stipulate in writing to the contrary, shall transmit a copy of such evidence to the Commission and stay further procedings for fifteen days from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may alter or rescind its order and shall report its action thereon to the Court. If the Commission rescinds its order the action in court shall be dismissed. If it alters or modifies the same, such altered or modified order shall take the place of the original order and judgment shall be rendered as though the order had been made by the Commission in the first instance (Sec. 405). A certified transcript of all the papers and proceedings, including the evidence in any case before the Commission, shall be filed by the Commission in such action and shall be evidence in like manner as the original transcript (Sec. 406). Either party to such action within twenty days after service of copy of the order of the court may appeal to the Court of Appeals of Maryland (Sec. 407). In all such trials, actions and proceedings "the burden of prof shall be upon the party adverse to said commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfac-

tory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful, as the case may be" (Sec. 408).

The question of the validity of the time limitation contained in Sec. 404 does not arise in this case, because the Company filed both its original and its supplemental bills within the time limited by the Section. Compare *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 445, where this Court said:

> "Some question has been made as to the validity of paragraph 65, which forbids all recourse to courts to set aside, vacate and amend the orders of the Commission after 120 days, and of paragraph 69, which puts the burden upon the party adverse to the Commission to show by clear and satisfactory evidence the inadequacy, unreasonableness or unlawfulness of the order complained of. It is suggested that this deprives the public utility of its constitutional right to have the independent judgment of a court on the question of the confiscatory character of an order and so brings the whole law within the inhibition of the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287. It is enough to say that even if paragraphs 65 and 69 were invalid, the whole act would not fail in view of paragraph 92 already referred to. *It will be time enough to consider the validity of those sections when it is sought to apply them to bar or limit an independent judicial proceeding raising the question whether a rate or other requirement of the Commission is confiscatory.*" (Italics supplied.)

It is clear that Sec. 404 contemplates a proceeding in court by way of bill in equity for an injunction. The proceeding may be brought in any court of Baltimore City of appropriate jurisdiction which may be adopted for the purpose. Among these courts are the Circuit Court and the Circuit Court No. 2 of Baltimore City (in the latter

of which the Company filed its bill in this case), both of which Courts are courts having general equitable jurisdiction. Further, Sec. 404 refers to the action or suit as one to vacate or enjoin enforcement of the Commission's orders and regulates the procedure on application for an injunction. The uniform practice in Maryland has been to proceed by way of a bill in equity for an injunction. *Public Service Commission* v. *Northern Central R. R.*, 122 Md. 355; *Penn. R. R. Co.* v. *Public Service Commission*, 126 Md. 59; *Havre de Grace Bridge Co.* v. *Public Service Commission*, 132 Md. 16.

The statutory provisions quoted, in one respect at least, enlarge the powers of the courts. "Any person in interest being dissatisfied with any order of the Commission", may bring his suit against the Commission. This has been construed to permit persons, who have no such property rights as would entitle them to invoke the inherent equity jurisdiction of the court, to file a bill in equity to enjoin an order of the Commission. *Benson* v. *Public Service Commission*, 141 Md. 398; *Miles* v. *Public Service Commission*, 151 Md. 337. It has never been held in Maryland that these statutes cut down the inherent chancery jurisdiction of the equity courts of the state.

New evidence may be introduced in court, but only by the party complaining of an order of the Commission. *Public Service Commission* v. *Byron*, 153 Md. 464, 472. The requirement that if such new evidence is introduced, it shall be transmitted to the Commission for consideration, is no more than a statutory recognition of the comity which should be observed by a court in passing on the validity of a legislative act.

These statutes confer no revisory legislative powers upon the Maryland courts. In *Public Service Commis-*

sion v. *Northern Central Rwy.*, 122 Md. 355, 388, it was said: "It must be observed that the power of the Commission to fix reasonable rates, etc., is legislative—*Gregg* v. *Laird, supra,*—and that the functions of the Court in reviewing the actions of the Commission are distinctly judicial, and are exercised only for the purpose of determining whether such action of the Commission is unreasonable or unlawful". See also *Havre de Grace Bridge Co.* v. *Public Service Commission*, 132 Md. 16, 24.

The construction put on the statute (Section 408) as to burden of proof by the Court of Appeals does not result in a denial of due process of law. In *Havre de Grace Bridge Co. vs. Public Service Commission*, 132 Md. 16, 24, this provision was referred to. The court, however, *weighed* the conflicting evidence and *reversed* the order of the Commission. See also *Public Service Commission vs. Byron, supra.* In the latter case the Court of Appeals cited and followed the decision of this Court in *Interstate Commerce Commission vs. Union Pacific Railway Co.*, 222 U. S. 541.

It will thus be seen that the Maryland statutes in themselves and as construed by the decisions of the Court of Appeals (apart from the decision now under review) present a situation strikingly like that dealt with by this Court in *Lehigh Valley Railroad Co. vs. Board of Public Utility Commissioners*, 278 U. S. 24. In that case an attack was made on the statute providing for the elimination of grade crossings by the Board of Public Utilities of New Jersey on the ground that it made no provision for appeal from the decision of the Board to a court with jurisdiction judicially to determine independently, on the law and facts, whether the property of the Company was being confiscated. This Court distinguished the *Ben Avon* case on the ground that the New Jersey legislation,

as construed by the State courts, provided an adequate judicial review either by way of certiorari or by resort to the court of chancery.

(2) It remains to consider whether the Court of Appeals in the instant case departed from the doctrine hitherto followed. The opinion of the Court of Appeals (R., pp. 1627-1630) contains a general discussion as to the extent to which the court will go in reviewing the conclusions and decisions of the Commission. Considering the opinion in the *Ben Avon* case, the Court of Appeals said that the requirement of that case to the effect that in confiscation cases provision must be made for submitting that question to some judicial tribunal authorized to adjudicate it upon its own independent judgment as to both law and facts, was "consistent with the theory that in reviewing the decision of an administrative agency the Court would review the facts as in an equity case". Thereupon the court goes on to say that it does not so construe the *Ben Avon* case. We submit that in so holding the Court of Appeals was in complete accord with the doctrine of this Court. Adequate judicial review does not require that the courts of a state shall have power *to make the same order that the commission should have made.* This would be conferring legislative or administrative jurisdiction on the courts. This Court, in *Keller* vs. *Potomac Electric Power Company,* 261 U. S. 428, held that such power could not constitutionally be conferred upon the Supreme Court of the United States. It was said (page 443-444):

> "The court proceedings to review the orders of the Commission, authorized by paragraph 64, are expressly required to conform to equity procedure. In that procedure an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as

the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses. This court is, therefore, given jurisdiction to review the entire record, and to make the order or decree which the commission and the District courts should have made.

Such legislative or administrative jurisdiction it is well settled cannot be conferred on this court either directly or by appeal."

Now the Supreme Court of the United States of course constantly passes on questions of confiscation. But if jurisdiction cannot be conferred upon it "to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses", it must follow that the *Ben Avon* case is not subject to the construction that it requires the states to provide a judicial review of commission orders according to equity procedure. This was the position of the Court of Appeals in the case at bar.

Concluding this portion of its opinion the Court of Appeals said: (R., p. 1630)

"* * * and we feel that in dealing with the constitutional questions involved in confiscation *some weight* must be given to the statute which places upon the person attacking the decision of the commission the burden of establishing its unlawful or unreasonable character by 'clear and satisfactory proof' ". (Italics supplied.)

Thus the final conclusion of the Court of Appeals was that there was nothing in the *Ben Avon* case which invalidated a statutory provision putting the burden of

proof on the party attacking an order of a commission. In this also the Court of Appeals was clearly right. The passage it cites from one of its own former decisions, *West vs. Byron*, (*Public Service Commission vs. Byron*, 153 Md. 464) to the effect that "the first rule is the order will not be disturbed except upon clear and satisfactory evidence that it is unreasonable or unlawful. This is a legislative mandate which is reenforced by the fact that the Commission is a tribunal erected by law, informed by experience, and assisted by a trained corp of subordinates",—is the doctrine laid down by this Court. *Darnell vs. Edwards*, 244 U. S. 564, 569.

Coming now to the manner in which the Court of Appeals dealt with the findings of the Commission, it is plain that the Court did in fact review the testimony taken before the Commission. It is true it gave effect to the statutory presumption in favor of the commission's findings. But it did not hold that it was without power to make its own independent determination on the evidence. This is made manifest by the fact already noted in this brief in another connection that the difference between the majority and the minority of the court consisted in differences concerning the *weight* of the testimony. Judge Parke, in his dissenting opinion, R., p. 1659, held that the testimony for the Company was clear that a return of 6.26 per cent was not fair, though admitting that evidence to the contrary was entitled to *some weight*. The majority of the court, however, held, on the identical question, that the testimony which convinced Judge Parke, though it tended to support the Company's contention, did not outweigh other testimony in the record. Our construction of the extent of review actually afforded by the court is still further confirmed by the concurring opinion of Judge Adkins. (R., pp. 1653-1654) He said:

"Nor, as I understand, was it intended to indicate that a finding of the Commission as to the proper amount to be allowed annually for accruing depreciation would be conclusive and unreviewable, even though the commission should base that finding on present value rather than the original cost, if the amount so found should be manifestly unreasonable on the whole evidence. Here, the question of confiscation is involved, and in any hearing by a Court on such a question it must be satisfied, not necessarily that it would have reached the same conclusion on the evidence, but, at least, that the conclusion reached by the commission was fairly deducible from the evidence. The opinion clearly indicates the kind of evidence on which a finding as to depreciation should be based."

CONCLUSION.

It is respectfully submitted that the decree in No. 55 should be affirmed and that the decree in No. 64 should be reversed.

Respectfully submitted,

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APPENDIX TO BRIEF

SCHEDULE A

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

Comparative Consolidated General Balance Sheet—Years Ended December 31, 1923, 1924, 1925, and 1926, and at August 31, 1927, Condensed from People's Counsel Exhibit No. 52

ASSETS	December 31, 1923	December 31, 1924	December 31, 1925	December 31, 1926	August 31, 1927
Road and Equipment	$88,571,841.34	$90,396,714.05	$91,085,815.44	$90,394,877.14	$90,575,521.66
Sinking and Depreciation Funds	260,492.16	322,040.82	376,547.45	447,244.24	461,544.06
Investments in Affiliated Companies	656,462.27	609,756.36	814,571.61	817,581.85	805,262.91
Other Investments	2,665.42	2,430.00	1,030.00	1,000.00	1,000.00
Current Assets	1,615,247.51	2,108,670.52	1,772,302.74	1,919,014.91	1,855,478.06
Deferred Assets	204,432.54	181,513.65	214,493.09	151,562.87	172,111.70
Unadjusted Debits	899,940.63	1,363,131.18	1,773,761.40	2,823,210.68	2,990,745.27
Deposits in Lieu of Mortgaged Property Sold	35,312.32	55,072.59			
Total Assets	$92,246,394.19	$95,039,329.17	$96,038,521.73	$96,554,491.69	$96,861,663.66
LIABILITIES AND CAPITAL					
Capital Stock:					
Parent Company	$20,461,200.00	$20,461,200.00	$20,461,200.00	$20,461,200.00	$20,461,200.00
Subsidiaries	402,000.00	250,976.84	250,976.84	250,976.84	250,976.84
Grants in Aid in Construction	90,259.45	90,259.45	90,259.45	90,259.45	118,471.10
Funded Debt:					
Mortgage Bonds	43,497,000.00	47,304,000.00	47,101,500.00	46,892,500.00	46,806,500.00
Income Bonds	13,977,000.00	13,977,000.00	13,977,000.00	13,977,000.00	13,977,000.00
Miscellaneous	6,392,700.00	6,392,700.00	6,392,700.00	6,392,700.00	6,392,700.00
Non Negotiable Debt to Affiliated Co.			200,000.00	200,000.00	200,000.00
Current Liabilities	2,405,769.50	1,424,441.04	2,318,493.18	2,429,862.28	2,997,727.63
Deferred Liabilities				264,485.59	618,291.49
Unadjusted Credits*	2,854,478.75	2,567,154.32	2,650,139.28	2,928,894.13	2,536,450.42
Surplus and Surplus Reserves	2,165,986.49	2,571,597.52	2,596,252.98	2,666,613.40	2,502,346.18
Total Credits	92,246,394.19	95,039,329.17	96,038,521.73	96,554,491.69	96,861,663.66
*Includes Reserves for Depreciation of	$1,187,374.92	$1,195,693.32	$1,303,799.05	$1,520,541.26	$1,413,792.79

SCHEDULE B

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

Comparison of Estimated Return of 9¢ Straight Fare, 3 Tokens for 25¢, with 10¢ Straight Fare, 4 Tokens for 35¢. The Latter Fare Became Effective December 1 1928, and is still effective

	(1) Estimated Return for 1928 at 9¢ or 3 for 25¢ fare, from page 56 of Commission's Order 12639, dated February 10, 1928		(2) Estimated Return at 10¢ or 4 tokens for 35¢, with depreciation based upon "Value"	(3) Estimated Return at 10¢ or 4 tokens for 35¢, with depreciation at 5% of Operating Revenue	(4) Estimated Return at 10¢ Straight Fare with depreciation based upon "Value", from Co. Exhibit 24 (R. 1428)	(5) Estimated Return at 10¢ Straight Fare with depreciation based upon "Value" as determined by Commission. Other figures taken from Company Exhibit 24 (R. 1428)	(6) Estimated Return at 10¢ Straight Fare with depreciation based upon 5% of Revenue. Other figures taken from Company Exhibit 24 (R. 1428)
	No. of Passengers	Revenues					
Cash Fare	$ 7,180,730	$ 646,266	$ 718,073	$ 718,073			
Token Fare	191,753,540	15,979,461	16,778,435	16,778,435			
Total Full Fares	198,934,270	16,625,727	17,496,508	17,496,508			
½ Fares, County Zone, School Fares etc.	16,463,000	810,150	810,150	810,150			
	$215,397,270	$17,435,877	$18,306,658	$18,306,658	$20,156,000	$20,156,000	$20,156,000
Other Revenue		235,000	235,000	235,000	235,000	235,000	235,000
Total Operating Revenue		$17,670,877	$18,541,658	$18,541,658	$20,391,000	$20,391,000	$20,391,000
Operating Expenses		$10,303,944	$10,303,944	$10,303,944	$10,394,000	$10,394,000	$10,394,000
Depreciation		883,544	1,687,068	927,083	2,200,000	1,687,068	1,019,550
Taxes:							
Property, etc.		487,110	487,110	487,110	542,000	542,000	542,000
Park Tax (6.7% of Total Fare Revenue)		1,168,204	1,226,546	1,226,546	1,350,500	1,350,500	1,350,500
Income Tax		138,469	138,469	230,737	355,000	377,212	457,314
Total Operating Expenses		$12,981,271	$13,843,137	$13,175,420	$14,841,500	$14,350,780	$13,763,364
Operating Income		$ 4,689,606	$ 4,698,521	$ 5,366,238	$ 5,549,500	$ 6,040,220	$ 6,627,636
Non-Operating Income		171,000	171,000	171,000	171,000	171,000	171,000
Gross Income		4,860,606	$ 4,869,521	$ 5,537,238	$ 5,720,500	$ 6,211,220	$ 6,798,636
Deductions from Gross Income		3,445,000	3,445,000	3,445,000	3,445,000	3,445,000	3,445,000
Net Income		$ 1,415,606	$ 1,424,521	$ 2,092,238	$ 2,275,500	$ 2,766,220	$ 3,353,636
Percent of Return—base of $75,000,000		6.26%	6.26%	7.155%	7.399%	8.053%	8.836%

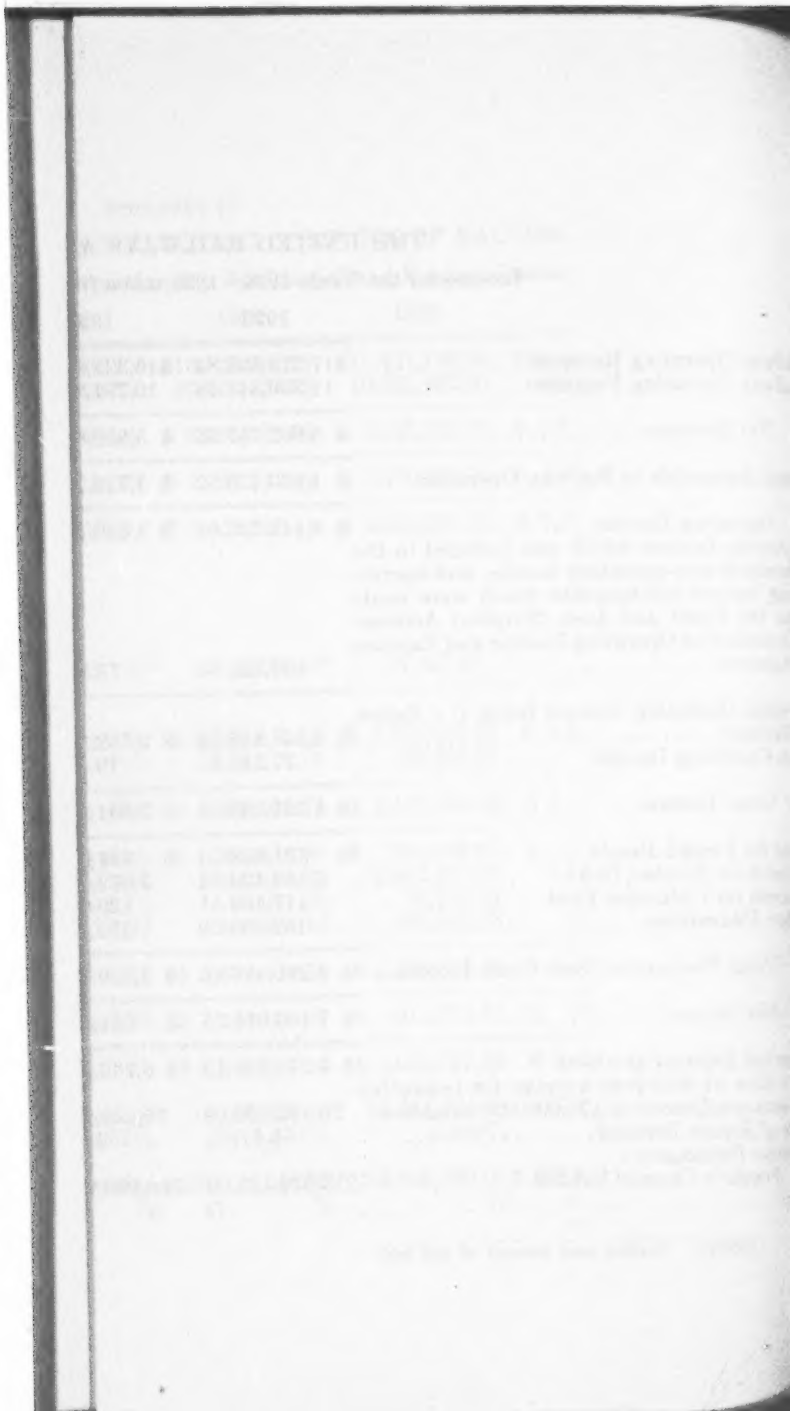
SCHEDULE C

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

Income for the Years 1920—1926 taken from Company Exhibit 6-C and People's Counsel Exhibit 12

	1920	1921	1922	1923	1924	1925	1926
Railway Operating Revenue	$17,313,598.84	$16,332,865.43	$16,122,592.02	$16,461,798.86	$16,453,254.31	$16,621,220.20	$16,715,709.07
Railway Operating Expenses	11,330,841.48	10,781,974.38	10,429,122.02	10,622,402.60	10,637,925.63	10,776,811.37	10,790,804.97
Net Revenue	$ 5,982,757.36	$ 5,550,891.05	$ 5,693,470.00	$ 5,839,396.26	$ 5,815,328.68	$ 5,844,408.83	$ 5,924,904.10
Taxes Assignable to Railway Operation	$ 1,839,420.92	$ 1,710,109.29	$ 1,740,512.49	$ 1,800,335.31	$ 1,656,073.68	$ 1,632,386.08	$ 1,672,316.22
Operating Income	$ 4,143,336.44	$ 3,840,781.76	$ 3,952,957.51	$ 4,039,060.95	$ 4,159,255.00	$ 4,212,022.75	$ 4,252,587.88
Operating Income which was included in the books as non-operating income, and operating income adjustments which were made to the Profit and Loss (Surplus) Account instead of to Operating Income and Expense Accounts	103,508.66	*78,617.86**	*4,739.99**	44,567.00	*34,674.42**	67,037.34	61,428.03
Revised Operating Income being the *Return Received*	$ 4,246,845.10	$ 3,762,163.90	$ 3,948,217.52	$ 4,083,627.95	$ 4,124,580.58	$ 4,279,060.09	$ 4,314,015.91
Non-Operating Income	77,543.51	79,450.97	110,818.19	83,708.87	67,745.02	78,125.77	99,658.47
Gross Income	$ 4,324,388.61	$ 3,841,614.87	$ 4,059,035.71	$ 4,167,336.82	$ 4,192,325.60	$ 4,357,185.86	$ 4,413,674.38
Rent for Leased Roads	$ 361,038.00	$ 361,038.00	$ 361,038.00	$ 361,038.00	$ 529,360.11	$ 551,013.92	$ 551,392.50
Interest on Funded Debt	2,589,420.32	2,672,489.17	2,696,131.25	2,652,495.00	2,652,495.00	2,652,495.00	2,652,495.00
Interest on Unfunded Debt	117,489.54	120,997.73	96,087.37	70,745.51	30,500.51	33,560.58	64,544.07
Other Deductions	152,530.00	155,205.57	156,678.12	138,544.88	122,906.97	115,158.71	113,670.71
Total Deductions from Gross Income	$ 3,220,477.86	$ 3,309,730.47	$ 3,309,934.74	$ 3,222,823.39	$ 3,335,262.59	$ 3,352,228.21	$ 3,382,102.28
Net Income	$ 1,103,910.75	$ 531,884.40	$ 749,100.97	$ 944,513.43	$ 857,063.01	$ 1,004,957.65	$ 1,031,572.10
Returned Received as above	$ 4,246,845.10	$ 3,762,163.90	$ 3,948,217.52	$ 4,083,627.95	$ 4,124,580.58	$ 4,279,060.09	$ 4,314,015.91
Rate Base at mid-year average for respective years as adjusted on $75,000,000 valuation	76,118,202.00	75,436,209.00	74,067,420.00	74,674,154.00	75,416,257.00	75,989,562.00	76,075,940.00
Rate of Return Received	5.579%	4.987%	5.331%	5.469%	5.469%	5.631%	5.671%
Revenue Passengers—							
People's Counsel Exhibit 3	253,934,129.00	238,090,980.00	233,732,146.00	238,658,380.00	228,423,774.00	224,235,527.00	225,255,633.00
Fare	7¢	7¢	7¢	7¢	5/6/24—8¢ or 2 for 15¢	8¢—2 for 15¢	8¢—2 for 15¢

NOTE: *Italics used instead of red ink.



SCHEDULE D

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

Showing Rates of Fare Necessary to Yield a Return Equal to 2½ Times the Fixed Charges, Based Upon Company Exhibit No. 24

Fixed charges per Company Exhibit No. 24	$ 3,445,000
2½ times thereof	8,612,500
Amount of Total Revenue necessary to yield 2½ times the fixed charges	$23,454,000
Less "Other Revenue"	235,000
Amount of Passenger Revenue necessary to yield a return of 2½ times the fixed charges	$23,219,000

ALLOCATION OF PASSENGER REVENUE

The Passenger Revenue is Allocated Below in the Proportions or Ratios Shown in the Footnote to Company Exhibit No. 24

	Revenue Passengers	Passenger Revenue	Rate of Fare
1st County	$ 2,202,355	$ 152,176	6.9 ¢
2nd County	255,222	20,549	8.05¢
3rd County	42,730	3,413	7.98¢
Beth. Steel	1,275,250	102,791	8.06¢
Miscellaneous	7,592	302	.....
Adult	6,986,786	804,817	11.52¢
Adult	186,572,522	21,492,691	11.52¢
Half Fare	7,675,274	442,067	5.75¢
School	3,475,819	200,194	5.76¢
	$208,493,550	$23,219,000	

Estimated return of above on a value of $75,000,000. Operating Expenses taken from Column 2 of Schedule C, with adjustment for income taxes 11.709%

SCHEDULE E

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE

Comparison of Prices—Taken from Company Exhibit No. 29

1913=100

	1920	1927	Percent Increase	Percent Decrease
All commodities wholesale U. S. B. L...	226	148		34.51
Cost of Living in Baltimore U. S. B. L...	198	175		1.16
Operating Expenses per C. M.....	208	212	1.92	
Platform Wages.....	208	224	7.69	
Union Labor.....	189	240	26.98	
Average Fare.....	139	150	7.91	

Comparison between Cost of Living and Fares Taken from People's Counsel Exhibit No. 23

1913 to 1927

Year	Wholesale all Commodities U.S.B.L.S.	Fare U. Ry. & E. Co.		Average Fare Per Revenue Passenger Amount	Index
1913.....	100		5¢	$.04867	100
1917.....	177		5¢	.04867	100
1918.....	194	10/1/18	6¢	.05124	105
1919.....	206	10/1/19	7¢ 2 for 13	.06013	124
1920.....	226	1/1/20	7¢	.06753	139
1921.....	147		7¢	.06782	139
1922.....	149		7¢	.06807	140
1923.....	154		7¢	.06800	140
1924.....	150	5/26/24	8¢, 2 for 15	.0719	147
1925.....	159		8¢, 2 for 15	.07316	150
1926.....	151		8¢, 2 for 15	.07320	150
1927 (Estimated).....	146		8¢, 2 for 15	.07320	150
1928.....	...	Proposed 10¢		.0968	199

SCHEDULE F

RECORD OF PRICES OF CAPITAL, TAKEN FROM PAGE XIX OF MOODY'S MANUAL OF PUBLIC UTILITIES FOR 1929

Year	Municipal Bonds	Railroad Bonds	Pub. Util. Bonds	Indus. Bonds	Indus. Pfds.	Foreign Govt's.	Price o Capita
1903	3.31%	4.10%	4.63%	5.69%	7.27%	.....	5.00%
1904	3.35	4.05	4.60	5.81	7.33	.....	5.03
1905	3.40	3.91	4.43	5.19	6.34	.....	4.65
1906	3.60	4.01	4.56	5.18	6.32	.....	4.73
1907	3.90	4.30	4.91	5.76	6.97	.....	5.17
1908	3.82	4.35	5.11	5.90	7.09	.....	5.25
1909	3.90	4.08	4.71	5.16	6.13	4.91%	4.79
1910	4.00	4.21	4.79	5.25	6.23	5.01	4.89
1911	4.06	4.23	4.77	5.17	6.25	5.01	4.89
1912	4.15	4.26	4.80	5.18	6.16	5.03	4.91
1913	4.30	4.41	4.90	5.35	6.42	5.19	5.05
1914	4.28	4.92	5.01	5.96	6.88	5.54	5.23
1915	5.35	4.89	4.81	5.57	6.83	5.42	5.27
1916	3.97	4.75	5.46	5.26	6.48	5.31	5.28
1917	4.22	5.10	5.40	5.97	6.98	5.66	5.43
1918	4.54	5.79	5.66	6.46	7.19	6.07	5.74
1919	4.62	5.96	6.30	6.57	7.25	6.32	6.01
1920	5.20	6.97	7.61	7.70	7.80	7.44	6.04
1921, 1st half	5.40	7.07	7.85	7.82	7.84	7.44	6.68
1921, 2nd half	5.61	6.24	7.36	7.96	7.92	7.73	6.85
1922, 1st quarter	4.71	5.68	6.92	7.17	7.55	6.97	6.79
1922, 2nd quarter	4.41	5.47	6.20	6.91	7.48	6.61	6.45
1922, 3rd quarter	4.19	5.38	6.38	6.79	7.35	6.72	6.23
1922, 4th quarter	4.12	5.76	6.24	6.41	7.22	7.03	6.12
1923, 1st quarter	4.22	5.63	6.09	6.63	7.19	6.51	6.10
1923, 2nd quarter	4.40	5.81	6.30	6.51	7.38	6.78	6.03
1923, 3rd quarter	4.42	5.58	6.42	6.43	7.40	6.76	6.10
1923, 4th quarter	4.61	5.52	6.32	6.65	7.24	6.68	6.09
1924, 1st quarter	4.39	5.21	6.31	6.55	7.32	6.39	6.08
1924, 2nd quarter	4.29	5.47	6.20	6.68	7.14	6.40	5.98
1924, 3rd quarter	4.24	5.20	6.11	6.30	6.92	6.59	5.86
1924, 4th quarter	4.17	5.00	5.91	6.36	6.99	7.03	5.78
1925, 1st quarter	4.00	5.17	5.77	6.24	7.26	7.18	5.77
1925, 2nd quarter	4.00	5.45	5.70	6.33	7.19	6.81	5.82
1925, 3rd quarter	4.17	5.37	5.38	6.06	6.63	6.68	5.79
1925, 4th quarter	4.30	5.09	5.82	6.11	7.06	7.30	5.82
1926, 1st quarter	4.25	5.13	5.80	5.88	6.76	7.26	5.77
1926, 2nd quarter	4.22	4.83	5.46	6.15	7.25	6.85	5.70
1926, 3rd quarter	4.21	5.11	5.71	5.93	6.96	6.78	5.76
1926, 4th quarter	4.36	5.09	5.51	5.68	6.59	7.04	5.74
1927, 1st quarter	4.25	4.91	5.41	5.70	6.52	6.47	5.60
1927, 2nd quarter	4.06	4.86	5.48	5.75	6.53	6.47	5.51
1927, 3rd quarter	4.11	5.04	5.30	5.93	6.46	6.15	5.50
1927, 4th quarter	3.96	4.60	5.16	5.53	6.37	6.81	5.38
1928, 1st quarter	3.88	4.70	5.25	5.45	6.26	6.28	5.34
1928, 2nd quarter	4.12	4.39	5.23	5.67	5.99	5.56	5.28
1928, 3rd quarter	4.46	...	5.71	6.05	6.00	6.78	5.63
1928, 4th quarter	4.30	4.75	5.35	6.05	6.33	6.68	5.47
1929, 1st quarter	4.51	4.90	5.57	6.12	6.08	6.86	5.61

SCHEDULE G

TABLE III. Weighted and Simple Average Yield at Offering Price of New Public Utility Security Issues

All Types of Securities

Year	All Maturities		Long Term		Short Term		Bonds and Notes	
	Weighted Average Yield	Simple Average Yield	Weighted Average Yield	Simple Average Yield	Weighted Average Yield	Simple Average Yield	Weighted Average Yield	Simple Average Yield
1919	6.55	6.68	6.21	6.25	6.78	7.03	6.54	6.67
1920	7.55	7.64	7.52	7.59	7.59	7.68	7.53	7.62
1921	7.13	7.47	7.11	7.42	7.27	7.66	7.11	7.45
1922	6.06	6.34	6.03	6.32	6.39	6.53	6.03	6.34
1923	6.04	6.31	5.99	6.26	6.73	6.72	6.11	6.29
1924	6.03	6.14	6.04	6.16	5.97	6.04	5.98	6.12
1925	5.58	5.81	5.66	5.83	5.55	5.86	5.56	5.78
1926	5.53	5.72	5.52	5.70	5.77	5.82	5.44	5.66
1927	5.24	5.61	5.25	5.57	5.11	5.77	5.12	5.57

404. Any corporation subject to this sub-title, or any of the provisions of this sub-title, and any person in interest being dissatisfied with any order of the commission, fixing any rate or rates, tolls, charges, schedules, joint rate or rates, or any order fixing any regulations, practices, acts or service, may commence any action in the circuit court for any county, or before any judge of the supreme bench of Baltimore city, in any court of Baltimore city of appropriate jurisdiction which may be adopted for the purpose, against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, tolls, charges, schedules, joint rate or rates, fixed in such order is unlawful or that any such regulation, practice, act or service fixed in such order is unreasonable, in which action a copy of the complaint shall be served with the summons.

The answer of the commission to the complaint shall be served and filed within twenty days after service of the complaint, whereupon said action shall be at issue and stand ready for trial upon fifteen days' notice to either party.

All such actions shall have precedence over any civil cause of a different nature pending in such court, and the courts shall always be deemed open for the trial thereof, and the same shall be tried and determined as other civil actions.

Every proceeding, action or suit to set aside, vacate or amend any determination or order of the commission, or to enjoin the enforcement thereof or to prevent in any way such order or determination from becoming effective, shall be commenced, and every appeal to the courts or right or recourse to the courts shall be taken or exercised within sixty days after the entry or rendi-

tion of such order or determination, and the right to commence any such action, proceeding or suit, or to take or exercise any such appeal or right of recourse to the courts, shall determine absolutely at the end of such sixty days after such entry or rendition thereof.

No injunction shall issue suspending or staying any order of the commission, except upon application to one of the judges of the supreme bench of Baltimore city, or to the circuit court of one of the counties, and upon notice to the commission and after hearing.

405. If, upon the trial of such action, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission, or any commissioner, or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceedings in said action for fifteen days from the date of such transmission.

Upon the receipt of such evidence the commission shall consider the same and may alter, modify, amend or rescind its order relating to such rate, or rates, tolls, charges, schedules, joint rate or rates, regulations, practice, act or service complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence.

If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance.

If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

406. Before the trial of such action a transcript duly certified by the Secretary of the Commission of all the papers and proceedings, including evidence, in the case before the Commission except such as are omitted by the stipulation in writing of the parties to such action, shall be filed by the Commission in such action and shall be evidence in like manner as the originals transcribed.

407. Either party to said action, within twenty days after service of a copy of the order or judgment of any court of Baltimore city or of the circuit court of any county, may appeal to the court of appeals of Maryland. Where an appeal is taken the cause shall, on the return of the record of the procedings to the court of appeals of Maryland, be immediately placed on the docket of the then pending term of the court of appeals, and shall be assigned and brought to a hearing in the same manner as other causes on the docket.

408. In all trials, actions and procedings arising under the provisions of this sub-title, or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission, or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful, as the case may be.

49. In all actions and procedings in court arising under this sub-title, all processes shall be served and the

practice and rules of evidence shall be the same as in civil actions, except as otherwise herein provided. Every sheriff or other officer empowered to execute civil processes shall execute any process issued under the provisions of this sub-title, and shall receive such compensation therefor as may be prescribed by law for similar services.

410. No person shall be excused from testifying or from producing books, accounts and papers in any proceeding based upon or growing out of the provisions of this sub-title on the ground or for the reason that the testimony or evidence, documentary or otherwise, required by him may tend to incriminate him or subject him to penalty or forfeiture; but no person having so testified shall be prosecuted or subjected to any penalty or forfeiture for on account of any transaction, matter or thing concerning which he may have testified or produced any documentary evidence; provided, that no person so testifying shall be exempted from prosecution or punishment for perjury in so testifying.